CNS 11/2020

Opinion in relation to the consultation made by the Data Protection Delegate of the Foundation of a hospital center on the obligation to communicate certain pathologies of people who are in the process of joining the security forces.

A request is submitted to the Catalan Data Protection Authority for an opinion from the Data Protection Delegate of the Foundation of a hospital center on the obligation to communicate certain pathologies of people who are in the process of entering to be part of bodies and security forces.

Having analyzed the query, which is not accompanied by other documentation, in accordance with the report of the Legal Counsel I issue the following opinion:

I

(...)

II

The consultation describes the situation of a patient with different hospital admissions since 2016 for psychotic decompensation, who is currently having a new outbreak that would have required hospital admission again. As stated in the query:

> **"(...) for a few months now the patient has again presented a psychotic decompensation that again requires hospitalization, where the patient expresses his intention to return, within a few weeks, to the Police School of Catalonia, where the patient has communicated that he is on sick leave but has not explained the reasons for this.**
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> **Likewise, the patient comments that in the event that he has a medical examination again, since in the first one it is deduced that he did not provide all the information or he concealed it, he will explain that he is taking antipsychotic medication and the reason for this. (...)"**

Next, the consultation raises whether article 22.6 of Law 10/1994, of 11 July on the police of the Generalitat - Mossos d'Esquadra and point 32 of the Code of Ethics would constitute a legal qualification for the alleged transfer in accordance with article 9.2.g) of the RGPD.

In view of this situation "an opinion is requested on whether the current regulatory framework enables the communication of data to the corresponding bodies of the Catalan Police Force by the entity or the professionals who participate in the medical care of the patient , or whether it would be in accordance with the applicable regulations to communicate the name and surname of the specific patient to the same body mentioned without determining their pathologies".

With 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), they are personal data. any 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;

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" .

In relation to the concept of personal information relating to health, according to Recital 35 of GDPR:

> **"Among the personal data relating to health must be included all the data relating to the state of health of the interested party that give information about their past, present or future state of physical or mental health. It includes the information on the natural person collected on the occasion of his registration for health care purposes, or on the occasion of the provision of such assistance, in accordance with Directive 2011/24/EU of the European Parliament and of the Council (1); any number, symbol or data assigned to a natural person that uniquely identifies him for health purposes; (…).”**

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)).

The information relating to the fact that a patient has been treated in a certain health center, the date of the patient's hospital or medical discharge, information about the disease or condition he suffers from and the severity of this disease, in short, any information about the health care provided to a specific patient in a health center is patient health information (art. 4.15 RGPD). Therefore, treating and, in particular, communicating information about the medical care that a patient receives in the health center and his diagnosis or his fitness or lack of fitness to carry out a job for reasons related to his health, to other people, in this case to the competent bodies of the Mossos d'Esquadra Police, means providing information related to health and the healthcare treatment received by the affected or interested party (art. 4.1 RGPD), which can be stated in your medical history (HC).

In this sense, the communication of the patient's data without reference to the pathology he suffers from, as proposed in the second section of the consultation, would not exclude this information from having the character of health data, if it reveals that the person affected suffers or may suffer from a certain health problem, even if it is not specified.

The content of the HC is regulated in the sectoral regulations (article 10.1 Law 21/2000, of 29 December, on the rights of information concerning the patient's health and autonomy, and clinical documentation; article 15.2 Law 41/2002, of November 14, basic regulatory of

patient autonomy and rights and obligations in terms of information and clinical documentation) and includes, on the one hand, identification data of the patient and of the assistance received (art. 10.1.a) Law 21/2000), clinical care data referring specifically to the patient's pathology or disease, family history, the clinical course, in short, the patient's state of health (art. 10.1.b) Law 21/2000), and social data (art. 10.1.c) Law 21/2000).

The information contained in the HC in the terms provided for in the regulations is all information about the patient's health, protected by the regulations (art. 9 RGPD and patient autonomy legislation), and not only that medical information that gives a greater degree of detail about the disease or treatment that the patient is following.

As this Authority has agreed in previous opinions, including CNS Opinion 41/2019, on the transfer of a patient's data to the Tax Agency, the date of assistance received or, where appropriate, the date on that a patient's hospital admission has occurred, is information from the patient's HC and as such is deserving of protection, even if the patient's specific disease or pathology is not specified; in the same way, the data referring to the room where a patient is admitted is considered health data (Dictamen CNS 37/2018) since from this data it is inferred, at the outset, the fact that this person is admitted to a hospital and suffering from an illness or health problem, even if this is not specified. Even, depending on the medical center in question, the disease affecting the admitted patient could be deduced from the simple record of the admission.

It must therefore be understood that communicating information about a patient's HC (such as his name and the date of a medical visit or the medical center where he has been treated) means communicating health data, even though do not specify in detail the illness you suffer from, or the specific reason for which you have

In short, the legal authorization for the communication of health data of the person who has been assisted in the hospital will be the same whether the specific pathology suffered by the patient is communicated or if their personal identifying data is communicated and that has been the subject of a hospital visit or admission, since in both cases this patient's health data is communicated (art. 4.15 RGPD), and as such are subject to the protection regime provided for in articles 6 and 9 of the RGPD, as we will see below.

III

In accordance with article 5.1 of the RGPD, personal data will be treated lawfully, loyally and transparently in relation to the interested parties (principles of "lawfulness, loyalty and transparency").

In order for a treatment to be lawful, one of the conditions provided for in article 6.1 of the RGPD must be met, among which, and for the case at hand, it is appropriate to analyze the one provided for in letter e) ("The treatment is necessary to fulfill a mission carried out in the public interest or in the exercise of public powers conferred on the person responsible for the treatment"). To the extent that it is an entity that is part of the public health system, it can be considered that it is an entity entrusted with a mission in the public interest. Likewise, the entity receiving the information would also be an entity entrusted with a mission in the public interest. Therefore, it is necessary to analyze whether this legal basis could enable the communication that the hospital center wants to carry out.

Despite the fact that, as has been pointed out, in abstract, article 6.1.e) could legitimize the treatment, it must be taken into consideration that article 5.1.b) establishes that the data must be collected for specific, explicit and legitimate, and cannot be subsequently treated in a manner incompatible with this purpose (principle of "limitation of the purpose").

In this regard, article 6.4 of the RGPD provides that:

> **"When the treatment for a purpose other than that for which the personal data was collected is not based on the consent of the interested party or on the Law of the Union or of the Member States that constitutes a necessary and proportionate measure in a democratic society for to safeguard the objectives indicated in article 23, paragraph 1, the person responsible for the treatment, in order to determine whether the treatment with another purpose is compatible with the purpose for which the personal data was initially collected, will take into account, among other things:**
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> **a) any relationship between the purposes for which the personal data have been collected and the purposes of the subsequent treatment provided;**
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> **b) the context in which the personal data have been collected, in particular with regard to the relationship between the interested parties and the controller;**
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> **c) the nature of personal data, in particular when special categories of personal data are treated, in accordance with article 9, or personal data relating to criminal convictions and infractions, in accordance with article 10; d) the possible consequences for the interested parties of the planned subsequent treatment;**
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> **e) the existence of adequate guarantees, which may include encryption or pseudonymization."**

The analysis of the criteria established in article 6.4 of the RGPD, in the case at hand, in order to determine whether the purpose of further treatment is compatible with the purpose for which the data of the patient treated have been collected in the hospital leads us to conclude that this compatibility of treatments would not exist.

Firstly, because there is no relationship between the purpose for which the data have been collected (assistance purpose) and the purpose of the subsequent treatment (making aware of facts that could have an impact on a selective process).

Secondly, because the analysis of the context in which the data were collected and the expectations of the interested party also does not allow us to conclude that there is a favorable scenario for this compatibility. It must be taken into account that the medical professional who obtains and processes patient information is obliged to respect the duty of secrecy or confidentiality regarding this inform This duty of secrecy not only derives from the obligation that, in general, is imposed by the data protection regulations themselves 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 medical history data (art. 15 Law 42/2002 and art. 9 Law 21/2000). Therefore, the relationship between patient and doctor is based on a special relationship of confidentiality and trust. In short, the person who is assisted by a doctor has an expectation of confidentiality of the information communicated in this healthcare process.

Thirdly, the analysis would also not pass the criterion of the nature of the processed data, since the data in question, as explained, are considered special categories of data.

And, finally, with regard to the possible consequences for the interested parties of the intended subsequent treatment, a serious harm to them cannot be avoided, given the nature of the data processed and the special context in which this communication would occur. From the point of view of the person concerned, the communication of the data relating to his mental illness would have, as it cannot be otherwise, a serious impact on his personal development.

Therefore, given article 6.4, it does not seem that the communication of personal data is compatible with the purposes set out in the consultation. Therefore, it will be necessary to see if there is any rule with the status of law that constitutes a necessary and proportional measure in a democratic society to safeguard the objectives indicated in article 23.1 of the RGPD which, in accordance with what is established by first paragraph of this article 6.4 of the RGPD allows the data to be used for a new purpose. This will be discussed in the legal basis below.

On the other hand, it is necessary to analyze whether any of the exceptions provided for in article 9.2 of the RGPD would be met. In this regard, remember that when dealing with special categories of data, as in the case at hand, it is necessary, in addition to the concurrence of one of the legal bases of article 6, the concurrence of one of the exceptions provided for in article 9 of th

Article 9.1 of the RGPD establishes a general prohibition of the processing of special categories of personal data, including data relating to health. Section 2 of the same article 9 of the RGPD provides that this general prohibition will not apply when any of the following circumstances occur:

"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 of the 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 Law of the Union or Member States, which must be proportional to the objective pursued, essentially respect the right to data protection and establish appropriate and specific measures 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 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;

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 adequate 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 patients treated for healthcare purposes can be carried out without the patient's consent, based on the provisions of the cited regulations (art. 9.2.h) RGPD and the health regulations.

In the case of the inquiry raised the communication of health data to a third party, in this case the communication to the corresponding bodies of the Catalan Police Force by the entity or the professionals who participate in the care medical treatment to the patient would not have the purpose of providing medical treatment to the patient or to third parties, but a different purpose consisting in bringing to the attention of the authority facts that have become known as a result of the care provision and that could have a impact on third parties. Therefore, the exception provided for in article 9.2.h) would not apply.

However, the RGPD itself in its article 9.2.g) provides that the law of the European Union or the law of the Member States, could enable the treatment of this particularly protected personal information, such as the health information of patients, for "reasons of an essential public interest", but requires that this treatment be proportionate to the objective pursued.

Regarding this, 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 must be taken into account that the same recital establishes that this is "without prejudice to the requirements in accordance with the constitutional order of the Member State in question".

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. This is established by article 9.2 of the LOPDGDD whi

"The data treatments contemplated in letters g), h) ei) of article 9.2 of Regulation (EU) 2016/679 based on Spanish law must be covered by a rule with the rank of law, which may establish additional requirements relative 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."

With respect to this issue, the Sentence of the Constitutional Court 76/2019, of May 22 (which annuls paragraph 1 of article 58 bis of the LOPDGDD, in relation to the authorization of the treatment through the 'article 9.2.g), has emphasized the range of the rule, and the characteristics it must have. In this regard, he points out the following:

"According to section 1 of art.9 RGPP, the processing of personal data that reveal political opinions is prohibited, as is the processing of personal data that reveal ethnic or racial origin, religious or philosophical convictions or trade union affiliation and the processing of genetic data, biometric data aimed at uniquely identifying a natural person, data relating to health or data relating to a natural person's sexual life or sexual orientation. However, section 2 of the same precept authorizes the treatment of all these data when any of the ten circumstances provided for there occur [letters a) aj)]. Some of these circumstances have a limited scope of application (labor, social, associative, health, judicial, etc.) or respond to a specific purpose, so that, in themselves, delimit the specific treatments that authorize as an exception to the rule general In addition, the enabling effectiveness of several of the cases provided for there is conditional on the Law of the Union or that of the Member States providing for and expressly regulating them in their area of competence: this is the case of the circumstances listed in letters a) , b), g), h), i) yj).

The treatment of the special categories of personal data is one of the areas in which the General Data Protection Regulation has expressly recognized the Member States "room for maneuver" when "specifying their rules", such as He qualifies his consideration 10. This margin of legislative configuration extends both to the determination of the enabling causes for the treatment of specially protected personal data - that is, to the identification of the purposes of essential public interest and the appreciation of the proportionality of treatment for the purpose pursued, essentially respecting the right to data protection - such as the establishment of "adequate and specific measures to protect the fundamental interests and rights of the interested party" (art. 9.2 g) RGPD). The Regulation contains, therefore, a specific obligation of the Member States to establish such guarantees, in the event that they are authorized to treat specially protected personal data.

Thus, the first enabling circumstance for the treatment of specially protected personal data, collected in letter a) of section 2 of art. 9 RGPD, consists of the explicit consent of the interested party: when "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 of the Member States establishes that the prohibition mentioned in section 1 cannot be lifted by the interested party". (...)

And for "the data treatments contemplated in the letters g), h) ei) of article 9.2 of article 9.2 of Regulation (UE) 2016/679 based on Spanish Law", the art. 9.2

LOPDGDD points out that "they must be covered by a standard with the force of law, which may establish additional requirements relating to their security and confidentiality". (Foundation 4) (...)

"This double function of the reserve of law translates into a double requirement: on the one hand, the necessary intervention of the law to enable the interference; and, on the other hand, that legal norm "must meet all those indispensable characteristics as a guarantee of legal security", that is, "must express each and every one of the budgets and conditions of the intervention" (STC 49/1999 , FJ 4). In other words, "not only does it exclude powers of attorney in favor of regulatory norms [...], but it also implies other requirements regarding the content of the Law that establishes such limits" (STC 292/2000, FJ 15)." (Foundation 5)

For all this, in the case raised, in which, as has been made clear, the explicit consent of the affected person is not available, it will be necessary to analyze whether there is a rule with the rank of law in the terms specified by the aforementioned STC that can enable this treatment based on the exception provided for in letter g) of article 9.2 of the RGPD.

IV

The Foundation's data protection representative considers whether the provision contained in section 6 of article 22 of Law 10/1994, of July 11, on the police of the Generalitat Mossos d'Esquadra enables the communication of data to the corresponding organs of the Catalan Police Force by the entity or the professionals who participate in the medical care of the patient, in relation to article 9.2.g) of the RGPD Law 10/1994 , of 11 July of the police of the Generalitat- Mossos d'Esquadra, regulates the selection systems of the people who must enter the scales and categories of the Corps of Mossos d'Esquadra. Thus, article 21 of this rule establishes that:

"1 Selection systems must in any case guarantee compliance with the principles of equality, publicity, merit and ability.

2 The selective tests to enter the levels and categories of the Police Force are of a theoretical-practical nature and may include physical, psychotechnical, medical and knowledge tests, which must be fixed in the bases of the call."

With regard to the verification of the requirements required by the call, article 22.6 of the aforementioned Law 10/1994 establishes:

"Regardless of the medical examination that may be established by the call, during the course or the internship period, or at the end of it, the applicants may be subjected to the medical tests that are necessary to check if there is any cause of exclusion in accordance with the table of medical exclusions established for the category. If the tests carried out show the existence of some reason for exclusion, the responsible body may propose, depending on the severity of the illness or physical defect, the exclusion of the applicant from the selection process, in in which case it is up to the body competent to make the appointment to adopt the appropriate resolution, which in no case can give the right to compensation".

From the wording of this precept no authorization can be deduced for the purposes of article 6.4 and 9.2.g) in the sense that a medical center that has knowledge, as a result of its care provision, of a circumstance that may constitute a cause of exclusion of applicants in a selection process for entry into the Mossos d'Esquadra body may bring this circumstance to the attention of the competent authority of the aforementioned police.

Beyond this precept, there is no reference in the aforementioned law to the participation of care centers in the detection of the causes of exclusion, since this process is carried out through the corresponding medical examinations provided for in the different phases of the call

On the other hand, point 32 of the Code of Ethics, which establishes, as stated in the consultation "that the doctor may disclose the secret with discretion, exclusively to whom he must do so and within the necessary fair limits, when with the silence, a very likely harm to the patient, to other people or a collective danger is presumed (declaration of contagious disease, certain mental illnesses, state of health of people in charge of "public affairs", etc.)", does not meet the requirements of legal rank to constitute a qualification in the terms of articles 6.4 and 9.2.g) of the RGPD.

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Beyond these considerations, it cannot be ignored that the medical center may be aware, based on the information provided by the patient as a result of the care provided, of certain facts that may constitute a criminal offense .

According to article 262 of the LECrim:

> **"Those who, by reason of their positions, professions or offices, have knowledge of any public crime, will be obliged to report it immediately to the Public Prosecutor's Office, the competent court, the investigating judge and, failing that, the municipality or the police officer near the site, if it is a flagrant crime.**
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> **Those who do not comply with this obligation will incur the fine indicated in article 259, which will be imposed disciplinaryly.**
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> **If the omission to give part was a Professor of Medicine, Surgery or Pharmacy and was related to the exercise of his professional activities, the fine may not be lower than 125 pesetas nor higher than 250.**
>
> **If the person who had incurred the omission was a public employee, his immediate superior will also be notified for the effects that would have taken place in the administrative order.**
>
> **The provisions of this article are understood when the omission does not produce liability in accordance with the Laws."**

Therefore, as a first consideration, it must be said that, if in the course of the health care that the Hospital provides to the patient, the care staff has knowledge or news of the commission of a public crime, communication would be enabled, however, the health professional or the hospital in which he provides services, should report it to the Public Prosecutor, the competent Court or the Magistrate or immediately to the nearest police officer, if it is of a flagrant crime (article 795.1.1ª LECrim.)

It should be specified that the reporting duty is limited to the reporting of criminal acts or alleged criminal acts.

In the case at hand, in accordance with article 21.2 of Law 10/1994, of 11 July on the police of the Generalitat Mossos d'Esquadra, the basis of the call sets the requirements and the necessary evidence to accredit them to access the body. As an example, the basis for the call to the Mossos d'Esquadra body approved by Resolution INT/2786/2019, of 29 October, for a call through open competition to fill positions in the category of police the basic scale of the Mossos d'Esquadra body, establishes as participation requirements, among others:

> **"d) Have the appropriate psychophysical fitness for the exercise of the police function and not be included in any reason for exclusion due to lack of psychophysical fitness from those listed in Annex 3 of this call."**

Annex 3 of the call establishes as a cause of exclusion due to lack of psychophysical fitness, among the psychiatric disorders provided for in point 7, "schizophrenia and other psychotic disorders (7.3)".

Point 6.1.5 of the bases, regulates the verification of the causes of exclusion due to lack of psychophysical fitness, and establishes:

> **"It consists of carrying out the necessary medical tests to verify that the participating people have the psychophysical fitness necessary for the development of police work and are not included in any of the causes of exclusion indicated in Annex 3. In these tests apply the medical techniques of conventional use that are considered appropriate, urine and blood analysis and the examinations or complementary tests that the doctors appointed by the qualifying court think appropriate. Each of the tests to be performed will be done in a single call on the days and hours that are determined.**
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> **Likewise, for the purposes of checking the causes of exclusion due to lack of psychophysical fitness in point 12.9 of annex 3, the relevant manipulation tests may be carried out with expert advisory staff in the field.**
>
> **At the beginning of the test, the participants must answer, by means of a sworn statement, a medical questionnaire about the diseases suffered and the medical treatments they have undergone. In the event that a participant does not complete or falsifies any of the data in this questionnaire, he/she will be excluded from the call. (...)**

Therefore, the regulatory regulations of the Mossos d'Esquadra police state that the capacity requirement for the development of the profession is not to suffer from psychiatric disorders such as schizophrenia or other psychotic disorders. The participants in the selective process of access to the body are aware of this requirement, established in the rules of the call, but in addition they must make a sworn statement about the diseases suffered and the medical treatments they have undergone.

The CP within Chapter II of Title XVIII, dedicated to documentary falsifications, typifies in article 392, as a crime committed by an individual, any falsity of those described in article 390, among which, that of missing the truth in the description of facts in a public or official document. Thus article 392.1 provides:

> **1. The individual who commits in a public, official or commercial document, any of the falsehoods described in the first three numbers of section 1 of article 390, will be punished with prison terms of six months to three years and a fine of six to twelve months**

In short, the falsehood in the request for access to a police force, above all because of the possible serious consequences of concealment or falsehood, such as the fact of concealing a psychiatric pathology that could cause serious damage both for the person himself who seeks to access the body, as, above all, for other people and society in general, given the risk that people with certain mental pathologies may provide police services, could constitute a crime specified in the Penal Code.

Faced with this situation, if the medical staff has knowledge or indications of a criminal act, in this case if you have indications of concealment or falsity in the declarations regarding the fulfillment of the medical requirements necessary to participate in a selective process for access to the Mossos d'Esquadra Police force as a result of having treated the patient with a psychiatric pathology of those included in the causes of exclusion from that process, they would have the obligation to put this fact in knowledge of the Fiscal Ministry or the competent Court, in accordance with the provisions of article 262 of the LECrim.

Conclusions

The provision contained in section 6 of article 22 of Law 10/1994, of 11 July on the police of the Generalitat Mossos d'Esquadra, does not constitute a qualification for communication at the Police School of Catalonia of an applicant's health data by the entity or the professionals involved in their medical care, either of the fact that this person has received treatment, or of the specific pathology for which they have been treated . This without prejudice to the fact that if the professional is aware of the commission of a crime he should bring it to the attention of the Public Prosecutor or the competent jurisdictional body.

Barcelona, April 9, 2020