

Ref. CNS 27/2020

Opinion in relation to the consultation of a body in the health field on the possibility of placing informational posters in health centers indicating the express prohibition of capturing images of patients and health professionals

A letter from a body in the health field (hereafter, the body) is submitted to the Catalan Data Protection Authority, in which it requests an opinion from this Authority in relation to the possibility of placing informational posters in the care centers of the entity, indicating the express prohibition of capturing images of patients and professionals of the centers.

The consultation explains that in the current context of the coronavirus pandemic and social alarm, some users would capture photographs of health professionals and also of "patients wearing protective masks who are supposedly understood to be under suspicion of coronavirus infection (although this is not the case)", in the health centers. The consultation adds that, despite the instructions from the professionals not to take photographs, the instructions are not heeded by these people.

Having analyzed the request, and given the current applicable regulations and the report of the Legal Counsel, the following is ruled.

I

(...)

II

According to the consultation, in the current context of the coronavirus pandemic and social alarm, some users would capture photographs of health professionals and also of patients, in health centers. The consultation adds that, despite the instructions from the professionals not to take photographs, the instructions are not heeded by these people.

According to the inquiry, the capture of images takes place "in common areas of public healthcare centers, such as waiting rooms, reception... but which could affect the rights of third parties (patients and workers) given that they have not given express consent to be photographed."

The consultation adds that, given this situation, we would be evaluating the possibility of putting up informative posters indicating the express prohibition of capturing images of both patients and professionals, in accordance with data protection regulations. However, the doubt arises as to whether it would be correct given that the care centers are public and the professionals have the status of statutory staff.

Based on 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"); an identifiable natural person will be considered any person

whose identity 1

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 physical, physiological, genetic, psychological, economic identity, cultural or social of said person;"

It is personal information subject to the principles and guarantees of the data protection regulations (RGPD and Organic Law 3/2018, of December 5, Protection of personal data and guarantee of digital rights (LOPDGDD)), all that information that refers to natural persons to whom the inquiry refers - patients or health care professionals -, specifically, the graphic image or, where appropriate, the voice of these persons.

Regarding this, we note that the query refers to the fact that at the moment there has been no knowledge that the photographs/recordings have been disseminated on social networks. Therefore, we cannot rule out for the purposes of this opinion that certain users capture not only photographs, but also record recordings that may include the voice of the people being recorded.

The capture of images or, where applicable, voices, of patients or users of health centers (such as people accompanying or relatives of patients), as well as of the professionals who attend to them, clearly constitutes a processing of personal data (art. 4.2 RGPD). Therefore, this treatment must be subject to the principles and guarantees of data protection regulations.

In the event that the persons appearing in the photographs or recordings are not recognizable without disproportionate effort, these persons would not be identified or identifiable and, therefore, data protection legislation would not apply. However, given the terms of the consultation, which refers to a generalized capture of images by users who go to a certain health center, it seems clear that the controversial photographs or recordings can affect a more or less wide number of people who, in large part, could be directly or indirectly identifiable. Therefore, the principles and guarantees of the RGPD would be applicable.

III

The RGPD does not apply to the processing of personal data carried out by a natural person in the exercise of exclusively personal or domestic activities (art. 2.2.c) RGPD) and, therefore, "without any connection with a professional activity or commercial" (consideration 18 RGPD), as this Authority has decided on previous occasions (among others, in Opinions CNS 58/2015, CNS 2/2016, or [CNS 58/2016](#), available on the v

Although according to the consultation the capture of the images is not carried out in an area of the intimate sphere of the person who does the capture, given the strictly personal use that can be given to this information with regard to certain treatments they could indeed enter of this exception.

This Authority has recalled that, according to the jurisprudence (Judgment of the Court National, of June 15, 2006):

"What is relevant for subjection to the data protection regime will not be because there has been treatment, but if said treatment has been carried out in a scope or purpose that is not exclusively personal or domestic. What is to be understood by "personal" or "domestic" is not an easy task. (...)

It will be personal when the data processed affect the most intimate sphere of the person, their family and friendship relationships and that the purpose of the treatment is no other than to produce effects in those areas."

In other words, the applicability of the domestic processing exception depends not only on the context in which the images are captured, but also on the purpose.

The consultation does not refer to what could be the intended purpose of the people who would have recorded images or recordings of patients or professionals in the care centers, beyond placing this treatment in the current situation of pandemic and social alarm.

Taking this into account, it cannot be completely ruled out that the "domestic treatment" exception provided for in the data protection regulations may apply (if the conversation between the doctor and the person treated takes place in a strictly personal or intimate context and the purpose of this recording unfolds its effects within this private sphere). In a case like this, the capture would remain excluded from the scope of application of the data protection regulations (LOPD and RGPD).

This is without prejudice to the applicability of the regulations governing the right to one's image (Article 18.1 CE), which can be defined as the right of "each individual to have others not reproduce the essential characteristics of his image without the consent of the subject, in such a way that any act of capture, reproduction or publication by photograph, film or other procedure of the image of a person in moments of their private life or outside it constitutes a violation or attack on the right fundamental to the image, as is the use for advertising, commercial or similar purposes" (STS of March 27, 1999).

In this sense, article 8.2 of Organic Law 1/1982, of May 5, on civil protection of the right to honor, personal and family privacy, and one's image (hereinafter, LO 1/1982), establishes certain cases in which the collection could be admissible without the need for consent:

"2. In particular, the right to one's own image will not prevent:

a) Its capture, reproduction or publication by any means, when it concerns persons who hold a public position or a profession of notoriety or public projection and the image is captured during a public event or in places open to the public. b) The use of the caricature of said persons, in accordance with social use. c) The graphic information about a public event or event when the image of a certain person appears as a mere accessory.

The exceptions contemplated in paragraphs a) and b) will not apply with respect to authorities or persons who perform functions that by their nature require the anonymity of the person who exercises them."

It is clear, for the purposes that are relevant, that the fact that a third party records images of professionals or patients who attend a health center or the people who accompany them, without their consent, would mean a clear impact on the rights to own image. According to what is presented in the consultation, it is not possible to ascertain, a priori, the concurrence of any of these circumstances.

On the other hand, remember that certain behaviors could constitute the crime of discovery and disclosure of secrets (art. 197 et seq. of the Penal Code, to which we refer). For the relevant purposes, according to article 197.7 of the CP:

"It will be punished with a prison sentence of three months to one year or a fine of six to twelve months who, without the authorization of the affected person, disseminates, reveals or transfers to third parties images or audiovisual recordings of the one he had obtained with his consent in a home or in any other place out of the reach of third parties, when the disclosure seriously undermines the personal privacy of that person.

The penalty will be imposed in its upper half when the acts had been committed by the spouse or by a person who is or has been united to him by a similar relationship of affection, even without cohabitation, the victim was a minor or a person with a necessary disability of special protection, or the acts would have been committed with a lucrative purpose."

However, beyond the strictly domestic purpose, referring to the collection by the affected person of information about their life, or in this case about the benefit received, other purposes that go beyond the strictly personal and are linked cannot be ruled out with the operation of the care services and the health care given to patients in the context to which the consultation refers. In this case, the data protection regulations would apply.

IV

Regarding the legality of the treatment (art. 5.1.a RGPD), article 6 of the RGPD provides the following:

"1. The treatment will only be lawful if at least one of the following conditions is met:

a) the interested party gives his consent for the treatment of his personal data for one or several specific purposes; b) the treatment is necessary for the execution of a contract in which the interested party is a party or for the application at the request of this pre-contractual measures; c) the treatment is necessary for the fulfillment of a legal obligation applicable to the person responsible for the treatment; d) the treatment is necessary to protect the vital interests of the interested party or another natural person; e) the treatment is necessary for the fulfillment of a mission carried out in the public interest or in the exercise of public powers conferred on the person responsible for the treatment; f) the treatment is necessary for the satisfaction of legitimate interests pursued by the person responsible for the treatment or by a third party, provided that these interests do not prevail over the interests or fundamental rights and freedoms of the interested party that require the protection of personal data, in particular when the interested party is a child. (...)."

In this sense, having the consent of natural persons would be an adequate and sufficient legal basis for the capture of images, for the purposes of Article 6.1.a) RGPD. But in the absence of consent, another legal basis would have to be available, as would be the case of the protection of the legitimate interests of the person making the recruitment (art. 6.1.f)

It should be added that the capture of images of patients who are treated in a health center can provide information about the state of health of these people and about the

fact that they receive

health care, so that, at least in some cases, the captured images could involve the processing of personal health information (art. 4.15 RGD).

In this sense, it should be noted that the RGD protects certain categories of data in a reinforced way. Specifically, article 9.1 RGD provides that: "The processing of personal data that reveals ethnic or racial origin, political opinions, religious or philosophical convictions, or trade union affiliation, and the processing of genetic data, data biometrics aimed at uniquely identifying a natural person, data relating to health or data relating to the sexual life or sexual orientation of a natural person."

Article 9.2 of the RGD foresees different cases in which there would be sufficient authorization to lift this prohibition, among others, to exercise or defend against claims (section f)), that the treatment is necessary for reasons of 'an essential public interest (section g)), for welfare purposes (section h)), among others. It also assumes sufficient authorization to have the explicit consent of those affected (art. 9.2.a) RGD).

It cannot be ruled out that in some specific case, and taking into account the provisions of the regulations in the field of public health, the capture of images of people suspected of suffering from a contagious disease, may be enabled for the purposes of bringing it to attention of public authorities. In this sense, article 9 of Law 33/2011, of October 4, general public health establishes:

"1. People who are aware of facts, data or circumstances that may constitute a serious risk or danger to the health of the population must bring them to the attention of the health authorities, who must ensure the protection due to personal data.

2. The provisions of the previous section are understood without prejudice to the communication and information obligations that the laws impose on healthcare professionals."

Now, given the context in which the recruitment would be carried out (during the health care process in a health center), it does not seem that it is up to the citizens to carry out the communication of these circumstances but the same health professionals who they attend to patients.

The capture of images of patients or their companions by a third party with whom the patient does not establish any professional relationship (other users of the same health services), does not seem to be able to fit into any of the conditions for enabling the treatment envisaged in article 9.2 of the RGD, to which we refer, which may enable the processing of data which, as has been said, may reveal information about the state of health of those affected.

Therefore, the capture and recording of images of patients or users of health services by other users, given the provisions of article 9.2 of the RGD, would only be appropriate if the explicit consent of those affected is available or another legal basis (art. 9.2. RGD).

On the other hand, the capture of images or recordings of patients treated in health centers by other users, in the terms proposed by the query, would be clearly disproportionate, for the purposes of data protection regulations, specifically, of the principle of minimization (art. 5.1.c) RGD), which requires processing the minimum data necessary to fulfill the intended purpose or, what is the same, only carry out the processing of data that is necessary or provided in attention to the purpose that motivates them.

For all this, for the purposes of the query formulated, it would not be contrary to the data protection regulations, which indicate to users of the health centers that the capture of images or recordings of other patients or users of the healthcare services requires the explicit consent of the affected persons or another legal basis, such as the occurrence of any of the cases admitted in the aforementioned Organic Law 1/1982.

v

Having said that, it is appropriate to refer specifically to the capture of images of professionals in care centers.

This Authority has analyzed in the aforementioned opinions the capture of images and recordings of public officials by citizens, from the perspective of data protection. Specifically, in CNS Opinion 58/2016, referring to the possibility of doctors refusing to record visits by people undergoing a medical inspection, which is of interest in the case at hand.

The query refers to the provision of article 8.2 of LO 1/1982, according to which the right to one's image does not prevent, among other cases, "its capture, reproduction or publication by any medium when it deals with persons who hold a public position or a profession of notoriety or public projection and the image is captured during a public act or in places open to the public" (section a).

According to the TS, this public projection is generally recognized for various reasons, such as, for political activity, for the profession, for the relationship with an important event, for the economic significance and for the social relationship, between of other circumstances (STS of December 17, 1997).

The provision of article 8.2.a) LO 1/1982 refers to "public positions" (art. 23 EC), and not in general to any official or public worker - or statutory, in this case -, and only is applicable, as a rule that can enable the capture and dissemination of images of certain people, when the image refers to a public event or is taken in places open to the public, a circumstance that is not applicable, due to the very nature of the centers healthcare and the development of the care tasks of healthcare professionals, to the collective that we deal with (professionals of the entity).

Therefore, the provision of article 8.2.a) of LO 1/1982 would not generally enable the capture and dissemination of images or recordings of care professionals by users of health centers.

Having said that, article 53.1 of Law 39/2015, of October 1, on the common administrative procedure of public administrations, provides that those interested in an administrative procedure have the right, among others, to know, at any time, the processing status of the procedures in which they have the status of interested parties (section a) art. 53.1), or to identify the authorities and staff at the service of the Public Administrations under whose responsibility a procedure is processed (section b) art. 53.1).

This would be equally applicable to the care staff of the entity that provides services based on the provisions of Law 55/2003, of December 16, of the Framework Statute of the statutory staff of health services.

As provided for in article 19 of Law 55/2003, the statutory staff of the health services are obliged, among others, to:

"(...).

h) Inform users and patients properly, in accordance with the rules and procedures applicable in each case and within the scope of their competences, about their care process and about the services available. (...) ñ) Be identified by their number and professional category by the users of the National Health System."

Therefore, in relation to capturing the image of care professionals, it is certainly necessary to take into account that they must be able to be identified by users, and that in their professional relationship with the patients they care for, they contract a series of duties and obligations towards these users.

Now, in application of the principle of minimization, if the purpose of the user who records images is simply to have a record of the identity of the professionals who serve him, the capture of images would be unnecessary and disproportionate, for the purposes of the data protection regulations.

For the purposes of the principle of minimization, if the purpose pursued in a given context can be achieved without the need to carry out the processing of personal data, without this purpose being altered or harmed, this possibility should necessarily be chosen, since the processing of personal data implies a limitation of the right of those affected to dispose of the information referring to their person (STC 292/2000).

Therefore, in those cases in which the purpose of recording images was this identification of the professionals who serve the user who records images, the consent of the affected professionals would also be necessary in the absence of another legal basis that could enable the treatment.

Beyond this mere identification purpose, it certainly cannot be ruled out that, in some specific case, and given the professional relationship established between healthcare professionals and their patients, it could be relevant for a specific patient to record images of the professionals who attend to you, as long as the specific purpose that motivates this treatment justifies it.

As an example, it could be the case that a user of the assistance services wants to capture images of the professionals who attend to him in order to record that he has not received adequate attention, to submit a claim, etc. It could even be the case that the purpose pursued by a user with the capture of images is to collect evidence or to have evidence of some situation that could constitute a crime or a misdemeanor, that is to say, that responds to the purpose of complying with the reporting obligation provided for in the Criminal Procedure Law (art. 259).

In short, in cases where the capture exceeds what can be considered a domestic treatment, it cannot be ruled out that the capture of images in a specific case may respond to a legitimate interest in having evidence about the operation of a public service for the purposes of being able to exercise the rights that the legal system attributes to citizens. As already explained in opinion CNS 58/2015, this circumstance could justify the capture.

However, in order to assess whether in any case the capture of images of healthcare professionals could fit into the legal basis of Article 6.1.f), cited, it would be necessary to carry out a weighting of interests that determines whether the legitimate interest of the responsible (which would be, in the case at hand, the user who records the images) is prevalent and, therefore, a sufficient basis for carrying out the treatment that is

intended to be carried out.

takes into account the criteria defined by the Article 29 Working Group (GT 29), which analyzed the application of legitimate interest in the "Opinion 06/2014 on the concept of legitimate interest of the data controller under Article 7 of Directive 95/46/EC". These criteria would be transferable to the regulation contained in article 6.1.f) of the RGPD to determine whether, in view of the specific circumstances of the case (the rights and interests involved, the reasonable expectations that those affected may have in the your relationship with the person in charge and the safeguards offered by the person in charge), it is appropriate or not to resort to this legal basis.

In addition, in cases where the legal basis of article 6.1.f) of the RGPD could apply, the person responsible should comply with the principles and obligations imposed by the data protection regulations.

In any case, beyond that the legal basis of article 6.1.f) of the RGPD could, in some specific case, enable the processing of images of healthcare professionals by some user, in the event that we occupies cannot be considered that this legal basis exists for any capture of images of users of care centers, in the terms raised in the consultation.

In conclusion, for all the above, it must be concluded that clearly visible information posters can be used detailing, in the terms that we consider most convenient, the collection and processing of data from care workers and others users require, as a general rule, their consent or another legal basis, as well as the obligation to fulfill the obligations provided for in the data protection regulations and the rest of the legal system.

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

Conclusions

It is in accordance with the data protection regulations to use clearly visible information posters in which it is detailed, in the terms that we consider most convenient, that the collection and processing of data of care workers and patients or their companions, requires, as a general rule, your consent or another legal basis, as well as the obligation to fulfill the obligations provided for in the data protection regulations and the rest of the legal system.

Barcelona, July 24, 2020