

Ref.: PD 5/2020

Report issued urgently, on an article, at the joint proposal of the Departments of Health and Work, Social Affairs and Families on the exchange of information between social services and health services, which is expected to be incorporated into a decree law

Background

An urgent request is submitted to the Catalan Data Protection Authority for a statement from this Authority regarding the wording of an article which, at the joint proposal of the Departments of Health and Work, Social Affairs and Families, is wants to incorporate it into a draft law that must be submitted urgently to the Government.

Having analyzed the Project, taking into account the current applicable regulations, and in accordance with the note drawn up by the Legal Adviser, I report the following:

Legal Foundations

I

(...)

II

The drafting proposal for the article submitted to report establishes the following:

"Article X

1. The competent departments of health and social affairs must establish the mechanisms to guarantee interoperability between the information systems of the shared clinical history and the information systems of the provider entities of the Network of Social Services of Public Attention, when it is necessary to guarantee comprehensive attention to people who use social services, which require coordinated and agile assistance interventions from the reference health and social teams.

2. The sharing of information between professionals in the health and social fields is necessary for the performance of their functions both at the level of planning, promotion, prevention and attention to people in a way comprehensive, addressing their care, social and health needs in a coordinated manner; it must also allow the identification of populations with greater risk or vulnerability that allow a proactive and planned approach to integrated care, as well as the analysis and improvement of these actions and services using population indicators and aggregate information.

3. The competent Departments of Health and Social Affairs will define the minimum set of data to be interoperable, with the aim of improving knowledge of care systems, service planning, assessment systems, the situation and the needs of the people served and to guarantee comprehensive attention to people and taking into account that the information accessed must be related to the provision of health or social care services in question and at the same time with the aim of achieving continuous improvement in the quality of the provision of services.

4. The sharing of information between the health sector and the social sector and the respective access of duly authorized personnel is justified to the extent that the communication facilitates the provision of health or care services to the interested party social in an integral way and that this is done in their best interest.

5. The health and social entities responsible for the processing of personal data must establish the appropriate organizational measures in order to guarantee the protection of the rights of the persons affected, the observance of the principles of Article 5 of the Regulation (EU) 2016/679, as well as compliance with the rest of the data protection regulations. Each competent entity must determine the people who can access the interoperable data, their duty to preserve the confidentiality of personal data, and must collect and preserve in their systems the traceability of the accesses made.”

From the point of view of the right to data protection, there would be no essential obstacle to the provision of interoperability between both systems (that is, that both systems have the technical capacity to be able to share information when necessary), given that as this Authority has already held in several opinions (for example, [CNS 32/2014](#) or [CNS 13/2020](#), and especially [CNS 37/2015](#)), both the health regulations and the social services regulations allow in certain cases the exchange of certain information between these services when necessary for adequate care of the people affected. And when this exchange must be carried out, doing so through interoperable systems can bring advantages not only for system agility and efficiency, but also from a data protection point of view.

Now, that the systems are interoperable, for the cases in which an exchange of information must occur between both systems, does not mean that in practice this can lead to indiscriminate access to the information contained in the information systems of the shared clinical history and the information systems of the provider entities of the Network of Social Care Services Public, but only in those cases where this is justified. Despite the existence of undeniable points of connection between both services, the principle of purpose would prevent this indiscriminate access.

On the other hand, the principle of minimization prevents a generalized and indefinite interconnection between both services (health and social services). It will be necessary to establish the legal provisions and the appropriate mechanisms to ensure that in each case only the information is communicated that is justified and respects the people in which it is necessary. It should be borne in mind that not all people served by the health system should be served by social services, nor should health services be able to access, without the consent of the people affected, the social services data of people who do not have to attend. Also in this sense, for example, it is clear that although some social services have

of health information of the affected persons may be justified, it must be taken into account that, given the breadth of social services, in many other services the possibility of accessing health information of the affected persons without their consent would not be justified consent. In this sense it is relevant that among the information that would be affected there can not only be information from special categories of data, as is the case with all the information that can be contained in the medical history, but also other information in the possession of the social services that despite not being part of special categories of data, can affect various aspects, in some intimate cases, of people's lives and that can allow a profile to be obtained.

Certainly, the terms in which the current regulations provide for social services' access to clinical history data and vice versa, that is to say, health services' access to information held by social services, can clearly be improved. However, in the light of the doctrine established by both the Constitutional Court (STC 76/2019) and the Court of Justice of the European Union (STJUE 8-4-2012 Digital Rights Ireland), this new rule should meet the requirements of predictability or concreteness of the cases affected and also the necessary guarantees. This could justify a regulatory change to clarify the applicable regime, but in any case it would require opening an in-depth study process in collaboration with the departments involved, and with their data protection delegates, in order to be able to evaluate the conditions under which the exchange of information would take place and its consequences, which is not compatible with the short time available for the analysis that is requested at this time.

STC 76/2019 is particularly illustrative in this regard, which declared the unconstitutionality of article 58.1 LOREG, precisely because this article of the LOREG provided for the treatment of special categories of data (in that case ideological data) without clearly establishing either the assumptions or the conditions under which the treatment could take place, and without providing adequate guarantees. In this sense, the Court makes it clear that it must be the law itself that establishes the guarantees, without them being able to refer to a later regulatory rule or to the decisions that can be taken by the person in charge of the treatment, as paragraph 5 seems to point out of the draft article.

This without prejudice to the fact that if, within the framework of the current health crisis situation, there is a specific case that requires a specific qualification urgently, this qualification can be foreseen, as long as it is done with the concreteness and adequate guarantees for the 'effectiveness of the principles of the protection of personal data, especially the principle of minimization and the temporal limitation of its effects.

In any case, the wording that is planned to be incorporated into the project, although it responds to a legitimate purpose, the comprehensive care of people, does not incorporate the requirements to specify the assumptions and the conditions in which they would be applicable, nor does it provide adequate guarantees more beyond the confidentiality and traceability of accesses.

III

With regard to section 2 of the article to be included in the project, this section foresees the use of the information included in these information systems for the identification of populations with greater risk or vulnerability that allow a care approach proactively integrated. This forecast, which would predictably lead to automated decision-making, or at least profiling, would require taking into account the additional guarantees necessary for

this type of decisions, and especially the need to draw up an assessment of the impact on data protection. In this sense, it is not superfluous to remember the right of people to consent to any action of the social services that affects them personally (art. 24.1 EAC and 9.2.g) of Law 12/2007, of 11 October, of social services).

Conclusions

Although it may be justified, in certain cases, the exchange of information between health services and social services, the concretization at the legal level of the authorization to do so cannot be done in a generalized way but rather requires specifying at a legal level the assumptions, conditions and guarantees to carry out this exchange, after an in-depth analysis of the assumptions affected and their consequences, which this Authority, due to the brevity of the available term, has not been able to carry out to term

Barcelona, June 22, 2020

Machine Translated