PD 13/2020

Report on a Proposal for an article to be introduced in a Decree-law on the access of nursing staff of the Catalan Institute of Medical Assessments to the clinical history

Background

The Department of Health asks this Authority to issue, as a matter of urgency, a report on a proposal for an article and an additional provision to be introduced in a Decree-Law on the access of nursing staff of the Catalan Institute of Medical Assessments (hereafter, ICAM) in the clinical history.

Specifically, the wording of the proposal is as follows:

Article (X)

"1. In order to deal with the increase in the actions attributed to the competent bodies of the Department of Health in the matter of medical evaluations that use the name of the Catalan Institute of Medical Evaluations, in the framework of the health emergency situation generated due to Covid-19, the nurses assigned to the said Institute are empowered to access the identification and health data of the clinical histories of those people who have a procedure related to control, inspection, the assessment and follow-up of temporary incapacity processes under the competence of the Catalan Institute of Medical Assessments that are necessary for the support of medical assessment staff in the functions assigned to them in this area.

2. The processing of personal data referred to in the previous section must be contained in the "Register of management of incapacity and medical evaluations", which is owned by the Department of Health, with the purpose of exercise the powers attributed to you in terms of control, inspection, evaluation and monitoring of medical and health processes.

3. The staff of the Catalan Institute of Medical Assessments referred to in section 1 must maintain the duty of secrecy and confidentiality regarding the information to which they have access, even after the emergency situation ends healthcare."

"Additional provision ....

The forecasts contained in article (X) of this Decree-Law are in force as long as the PROCICAT Action Plan remains active for emergencies associated with emerging communicable diseases with high potential risk."

In the report request it is stated that, within the framework of the collaboration agreement of December 5, 2017 between the Ministry of Labor and Social Security and the Administration of the Generalitat of Catalonia, through the Department of Health, for the control of temporary incapacity during the

period 2017 to 2020, the INSS entrusted the Generalitat de Catalunya with the medical controls in the IT processes, so that after the first 365 days, the INSS or the Social Institute of the Navy (ISM) in each province , issues the corresponding resolution.

It is stated that the situation caused by the pandemic has meant an increase in the actions carried out by the ICAM derived from the execution of the tasks of issuing notices of discharges and discharges due to Covid-19, both for sick people and for contacts narrow, as well as other support actions that have been attributed to it in the field of primary care. This has generated a considerable delay in the processing of the files, which causes harm to citizens in the recognition of their benefits. In order to deal with this increase in tasks, it is stated that it is considered essential to strengthen the support tasks for the medical staff evaluating in the processes of temporary incapacity under the jurisdiction of the ICAM, which are carried out by the nurses attached to this unit temporarily enabling him to access the clinical records and clinical documentation that supports the evaluation file, as well as the tools and computer systems of the health system that contain this information.

This measure would be in force as long as the PROCICAT Action Plan for emergencies associated with emerging transmissible diseases with high risk potential remains active.

Having analyzed the proposal, which is accompanied by a justification of the measure and a document on the quantification of the increase in workload that ICAM is taking on as a result of the pandemic, taking into account the current applicable regulations, and in accordance with the report of the Legal Counsel I issue the following report:

Legal Foundations

I

(...)

II

In accordance with article 6 of the RGPD, in order to carry out personal data processing, one of the legal bases of article 6.1 must be met. Among the legal bases provided for, in the case we are dealing with would be the one provided for in letter e), referring to those cases in which the treatment is necessary for "for the fulfillment of a mission carried out in the public interest or in the exercise of powers public given to the person in charge of the treatment;".
On the other hand, the processing of health data for the purpose of assessing the working capacity of the working person and management of the health and social assistance system could be authorized by letter h) of article 9.2 RGPD.

In accordance with the provisions of these articles, the legal basis must be established in the law of the member state that applies to the person in charge or the law of the European Union which, in any case, must determine the purpose of the treatment. With regard to the quality of this rule, it must fulfill an objective of public interest and must be proportional to the aim pursued (art. 6.3 if).

Regarding the scope of the internal law rule, Recital 41 RGPD establishes that "When this Regulation makes reference to a legal basis or a legislative measure, this does not necessarily require a legislative act adopted by a parliament, without prejudice to the compliance requirements of the constitutional order of the Member State in question.".

It should be taken into account in this respect that, in Spanish law, the rule that establishes the treatment must be a rule with the rank of law, as it follows from Article 53 EC to the extent that it entails the limitation of a right fundamental, and as constitutional jurisprudence has come to recognize (SSTC 292/2000 and 76/2019, among others), of the Court of Jus European (STJUE 08.04.2014, Digital Rights Ireland, among others) and the European Court of Human Rights (STEDH 07.06.2012, Cetro Europa 7 and Di Stefano vs. Italy, among others). In this sense, article 8.2 of Organic Law 3/2018, of December 5, on the protection of personal data and guarantee of digital rights (LOPDGDD) establishes that "The treatment of personal data can only be considered based on the fulfillment of a mission carried out in the public interest or in the exercise of public powers conferred on the person in charge, in the terms provided for in article 6.1 e) of Regulation (EU) 2016/679, when it derives from a competence attributed by a rule with the force of law. ". Article 9 LOPDGDD is pronounced in similar terms regarding the processing of data from special categories of data, such as health data.

The Decree-Law constitutes a norm with the rank of law, and if it affects a fundamental right, such as the right to the protection of personal data, the analyzed regulation does not involve the essential regulation or the direct development of the fundamental right (question already done by the RGPD and Organic Law 3/2018), so it would not go against Article 64 EAC. Therefore, as recognized in STC 139/2016, a Decree-Law is a suitable rule to enable a certain processing of personal data.

III

Without prejudice to what has just been explained, the rule that is approved must also take into account the rest of the principles established by the personal data protection regulations, specifically, the principle of data minimization, under of which the data processed must be adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed (art. 5.1.c) RGPD and art. 9 of Convention 108 of the Council of Europe, for the protection of individuals with regard to the automated processing of pe

According to Recital 41 of the RGPD, "said legal basis or legislative measure must be clear and precise and its application foreseeable for its recipients, in accordance with the jurisprudence of the Court of Justice of the European Union (hereinafter, "Court of Justice") and the European Court of Human Rights." In this sense, for example, the SSTEDH of September 6, 1978 (Klas vs. Germany), August 2, 1984 (Malone vs. UK), July 30, 1998 (Valenzuela Contreras vs. Spain), 18 February 2003 (Prado Bugallo vs. Spain) or STC 76/2019.

The intended treatment constitutes a limitation of the fundamental right to data protection that may be justified. But it will only be so to the extent that it is proportionate (art. 6.3 RGPD). As recognized by the STJUE of April 8, 2014 (Digital Rights Ireland case, among others)

"According to article 52, section 1, of the Charter, any limitation of the exercise of the rights and freedoms recognized by it must be established by law, respect its essential content and, within the respect of the principle of proportionality, may only be introduced limitations to said rights and freedoms when they are necessary and respond effectively to objectives of general interest recognized by the Union or to the need to protect the rights and freedoms of others.". In the same sense, SSTC 292/2000 or 76/2019, among others.

In accordance with repeated jurisprudence (STC 66/1995 serves for all) the analysis of compliance with the principle of proportionality of a certain measure requires what is known as the "test of proportionality". This involves a threefold analysis:

a) The suitability of the measure, that is to say, if the measure is suitable to achieve the intended result.

b) The need for the measure, that is to say, if there are other less intrusive or more moderate measures to achieve the intended result.

c) The analysis of proportionality in the strict sense, that is to say, if the measure derives more benefits for the general interest than damages on the other legal assets or values in conflict.

Therefore, the treatment provided for by the rule must be an appropriate, necessary and proportionate measure in the strict sense.

IV

This Authority, in Opinion CNS 61/2015, considered that, in accordance with current regulations (basically article 40 of the revised text of the General Social Security Law (LGSS) approved by Royal Legislative Decree 1/1994 , of June 20 and Royal Decree 625/2014, of July 18, which regulates certain aspects of the management and control of the processes for temporary incapacity in the first three hundred and sixty-five days of its duration) , the ICAM staff who are considered medical inspectors in IT processes can access, without the consent of the people affected, the primary and specialized clinical documentation of workers in an IT situation. This access is characterized by:

a) Access must be necessary for the exercise of its medical inspection functions.

b) Access must be limited to reports, clinical documentation, and other medical data strictly related to the injuries and ailments suffered by the interested party that are relevant to the resolution of the procedure. It cannot, therefore, cover other information that, despite appearing in the medical history of the affected persons, is not relevant in relation to the recognition or maintenance of the IT situation.

c) Affected persons must have the possibility to object to this communication. This reference to the possibility of opposing the communication, should not be understood as an exercise of the right of opposition provided for in article 6.4 of Organic Law 15/1999, of December 13, on protection of personal data (LOPD), which requires justification

based on well-founded and legitimate reasons relating to a specific personal situation, but it will be sufficient for the affected person to express their opposition expressly and in writing, without the need for justification. For this reason, although consent is not required in these cases, it is important that, prior to access, the affected persons are informed of this possibility of opposing it.

The proposal that is presented now wants to extend this qualification also to the nursing staff assigned to the ICAM.

The application of the doctrine set out with respect to the requirements that must be met by the rule with the rank of law that foresees a certain treatment of personal data leads to the conclusion that the proposed article is endowed with predictability and is proportionate.

The measure is endowed with predictability given that both the collective to which it refers (nursing staff assigned to the ICAM) and the information to which it must be possible to access (identifying data and of health of the clinical histories of those people who have in process a procedure related to the control, inspection, evaluation and follow-up of the processes of temporary incapacity under the competence of the Catalan Institute of Medical Assessments that are necessary for the support to the evaluating medical staff).

On the other hand, the measure is also proportionate:

At the outset it can be considered suitable (that is, it allows the intended result to be achieved) given that it would make it possible to deal with the described situation of increased activity as a result of the current pandemic situation.

It can also be considered necessary, because the possibility that this task be assigned to personnel who have the status of health personnel providing services at the ICAM appears as a less intrusive measure than other alternative measures such as assigning it to personnel who do not have the status of health personnel.

On the other hand, if it is true that there may be other alternatives, such as increasing the staff of inspectors or medical assessors or even the creation of a body of sub-inspectors (as pointed out in the consultation that happens in other autonomous communities), are less appropriate measures to deal with an urgent and temporary situation such as that caused by the pandemic situation.

Finally, the measure can also be considered justified from the point of view of the analysis of proportionality in the strict sense.

Thus, on the one hand, as set out in the justification of the measure, the current situation generates a "considerable delay in the processing of files, which causes harm to citizens in the recognition of their benefits". The proposed modification seeks precisely to avoid the damages that can be derived from a delay in the recognition of benefits. The benefits are clear, then.

From the point of view of the costs of the measure, or in other words, of the intrusion that this measure would entail for the right to data protection of the affected persons, it is

undeniable that it would lead to access to the clinical history for a purpose other than healthcare. But as we have seen, current legislation already allows access for this purpose by inspectors or medical assessors. The fact that the nursing staff who assist these professionals will also be able to access them entails an impact on the right, but that must yield to the benefits for the system and for the same person who owns the data who, in a health and economic crisis situation like the current one are derived from a measure like the one proposed that allows to speed up the procedure related to the control, inspection, evaluation and monitoring of the temporary incapacity processes.

On the other hand, with regard to the risks, it must be remembered that the possibility of nursing staff accessing the clinical history is not an exceptional fact either, given that in the case of healthcare purposes, it is not surprising that staff from 'nursing can access it when necessary for the specific functions assigned to it.

On the other hand, as has been explained, the option chosen in the proposal guarantees that the personnel who will have access to it will continue to be only health personnel; it is planned to be temporary (the measure would only be in force as long as the PROCICAT Action Plan remains activated for emergencies associated with emerging communicable diseases with high risk potential); and finally the duty of secrecy and confidentiality regarding the information to which you have access is remembered, even after the health emergency situation end

In view of all these circumstances, the proposal presented must be considered adequate from the point of view of the right to data protection.

Conclusions

The proposed article examined, to be introduced in a Decree-law, on the access of nursing staff of the Catalan Institute of Medical Assessments to the clinical history while the PROCICAT action plan for associated emergencies remains activated to emerging transmissible diseases with high risk potential, it would comply with the personal data protection regula

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