CNS 15/2021

Opinion in relation to the query made by a body in the field of health on whether the forces and security bodies can request a copy of the injury report to incorporate it into the proceedings if there is no consent of the affected person

A query from a body in the field of health is presented to the Catalan Data Protection Authority on whether the forces and security forces can request a copy of the injury report to include it in their proceedings if there is no consent of the affected.

In the consultation it is stated that injury reports must be made in triplicate. Of the three copies, one remains at the HC, another is provided to the injured party and a third is sent to the guardianship court.

Regarding the statement of injuries, we are requesting the opinion of this Authority on the following specific issues:

"Can the forces and security bodies request a copy in order to incorporate it into their proceedings if there is no consent from the affected person?. Could they rely on the investigation and prevention of crimes to do so?

Would there be exceptions in the event of a denial of access? In other words, could a case of gender-based violence be considered sufficient to obtain a copy without the consent of the affected person? And an assault on a minor?

On the other hand, if the Forces and Security Forces accompany the injured person and he is not in a position to take charge of his copy, it could be given to the police so that they can keep it until the time that the person concerned is, for example, at home? In this case, it is proposed to give the copy in a sealed envelope in front of the interested party, informing him of this circumstance to the extent that he can understand it."

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

I

(...)

II

The us formulates a query about the relationship between injury reports and the security forces and bodies and raises a first question relating to determining whether the security forces and bodies (hereinafter FFCCS) may request a copy of the injury statement in order to incorporate it

to their proceedings if there is no consent from the affected person and if they could be protected in the investigation and prevention of crimes to do so.

From the terms in which the query is formulated, it is interpreted as the request for the statement of injuries it would be done by the FFCCS at the medical center or hospital that treated the affected person.

The Criminal Procedure Law establishes in its article 262, the general duty to report possible crimes to the Ministry of Finance, the competent Court, or the Judge of instruction that falls to those who know them because of their profession. The said law refers in its article 355, to the optional personnel and specifies that *"If the criminal act that motivates the formation of a causa cualquiera consists of injuries,* ***the Doctors who attended the injured will be obliged to give part of their state*** *and advances in the periods indicated, and immediately that any news occurs that deserves to be brought to the attention of the investigating judge ."*

The statement of injuries is, therefore, the document issued by the doctor to inform the Judge of the condition of the person he has treated when he has indications that the injuries he presents are the result of a possible criminal act. In accordance with this purpose, the statement will contain the description of the injuries produced, the treatment carried out during the assistance, the prognosis, as well as the information that may be of interest so that the court can adopt the necessary measures in each case . Therefore, it is a document containing the health data of the person assisted, and as the body states in its consultation, a copy of it is incorporated into the patient's Clinical History.

The processing of data carried out by a health center, whether in this case the data of the patients contained in the injury reports, as in general any other processing of personal data, including the assignments that can be made to a third, it is subject to principles and guarantees of Regulation (EU) 2016/679, of April 27, 2016, General Data Protection (hereafter, RGPD).

Article 5.1.a) of the RGPD establishes that all processing of personal data must be lawful, fair and transparent in relation to the interested party (principle of lawfulness, loyalty and transparency).

In order for a treatment to be lawful, it is necessary to have, at least, a legal basis of those provided for in article 6.1 of the RGPD that legitimizes this treatment, either the consent of the person affected, or any of the other circumstances which provides for the same precept.

In addition, when the treatment has as its object, as in the case at hand, special categories of data, it must be taken into account that article 9 of the RGPD establishes a general prohibition of the processing of personal data of various categories, among d 'others, of data relating to health, genetic data, or data relating to the sexual life or sexual orientation of a natural person (section 1). Section 2 of the same article provides that this general prohibition will not apply when one of the following circumstances occurs:

> *"a) the interested party gives his explicit consent for the treatment of said personal data with one or more of the purposes specified, except when the Law of Union or member states establish that the prohibition mentioned in section 1 cannot be lifted by the interested party;*

c) the treatment is necessary for the fulfillment of a legal obligation applicable to the person responsible for the treatment;
(…)

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;

(…).".

Regarding the treatment of special categories of data, Article 9.2 of Organic Law 3/2018, of December 5, on the protection of personal data and guarantee of digital rights (LOPDGDD) establishes the following:

"The data treatments provided for in letters g), h) ii) of article 9.2 of Regulation (EU) 2016/679 based on Spanish law must be covered by a rule with the status of law, which can establish additional requirements regarding its security and confidentiality.

In particular, this rule can protect the processing of data in the field of health when this is required by the management of health and social assistance systems and services, public and private, or the execution of a contract insurance of which the affected person is a party."

Likewise, the seventeenth additional provision of the LOPDGDD specifically indicates the existing legal authorizations for the treatment of health data with respect to health and insurance legislation, including Law 41/2002, of November 14, basic regulatory patient autonomy and rights and obligations regarding information and clinical documentation.

Thus, the treatment of the health data contained in the statement of injuries consisting of its transmission to the Courts or Tribunals is intended to comply with the legal obligation to inform them of the health care for injuries received by a person in a center
healthcare that has as its legal basis articles 6.1.c) and 9.2.g) of the RGPD, in relation to the legal obligation contained in articles 262 and 355 of the Royal Decree of September 14, 1882 by which the Law is approved of Criminal Prosecution.

In the case raised in the consultation on the possibility that the statement of injuries can also be transferred to the security forces and bodies without the consent of the interested party for a purpose other than that which they were collected as they could be purposes related to the functions that the

regulatory framework attributed to the FFCCS, this regulatory framework must be taken into account to analyze whether the communication (art. 4.2 RGPD) can be considered enabled.

III

Law 41/2002, basic, on patient autonomy and rights and obligations regarding clinical information and documentation. as well as Law 21/2000, of December 29, on the rights of information concerning the patient's health and autonomy, and clinical documentation, regulate the content, uses and conservation of the patient's clinical history.

To the extent that the injury report is incorporated into the patient's clinical history, it will be necessary to analyze the provisions contained in these regulations regarding the uses and possible access to this information. Specifically, article 16 of Law 41/2002, when it regulates the uses of the information contained in the clinical history, establishes the possible access to the information for purposes other than healthcare. Thus the third section of this article 16 establishes:

> *"Access to clinical history for **judicial,** epidemiological, public health, research or teaching purposes is governed by the provisions of Organic Law 15/1999, of December 13, on the Protection of Personal Data, and in Law 14/1986, of April 25, General of Health, and other applicable rules in each case. Access to the clinical history for these purposes obliges to preserve the personal identification data of the patient, separate from those of a clinical-care nature, so that, as a general rule, anonymity is ensured, unless the patient himself has given his consent not to separate them.*
>
> The cases of ***investigation by the judicial authority** are excepted in which it is considered essential to unify the identifying data with the clinical assistance, in which **it will be what the judges and courts have** in the corresponding process. Access to the data and documents of the clinical history is strictly limited to the specific purposes of each case."*

Therefore, article 16.3 of Law 41/2002, limits access to HC data without anonymization to *"judicial purposes"*, linking these purposes and, ultimately, the transfer of the data, to *"cases of investigation by the judicial authority".*

It must be taken into consideration that without prejudice to the functions that may correspond to other FFCCS at state level, the police forces that act in the area of Catalonia (squad officers and local police), are assigned the exercise of judicial police and criminal investigation functions.

Thus, article 164.5 of the Statute of Autonomy of Catalonia (EAC) provides that the police of the Generalitat-Mossos d'Esquadra have as their scope of action the entire territory of Catalonia and exercise all the functions of "a police force, in the areas of public security and public order, administrative police, and judicial police and criminal investigation, including the various forms of organized crime and terrorism, in the terms they establish the laws

Law 4/2003, of April 7, on the organization of the public security system of Catalonia (LSPC), provides that the protection of the authorities of the Generalitat and the surveillance and custody of its own buildings, facilities and dependencies, those of the public security police and order public, those of administrative police and those corresponding to him as judicial police (article 28.2 LSPC). According to article 28.3 of the same LSPC, local police also exercise, among others, judicial police functions, especially in relation to traffic (article 28.3.f) LSPC).

Article 11 of Law 16/1991, of July 10, on the local police, lists the functions that correspond to the local police in their field of action, among others, those of judicial police, as well as the relating to actions related to prevention efforts and actions aimed at preventing the commission of criminal acts. Article 12 of the same law provides that the local police can perform judicial police functions, in the terms specified in the aforementioned article.

With regard to the Judicial Police, article 126 of the Spanish Constitution provides that it depends on the Judges, the Courts and the Public Prosecutor in their functions of investigating the crime and discovering and securing the criminal, in the terms that the law establishes.

Article 547 of Organic Law 6/1985, of July 1, on the Judiciary (LOPJ), provides that:

> *"The function of the Judicial Police includes assistance to the courts and tribunals and the Public Prosecutor's Office in the investigation of crimes and in the discovery and securing of criminals. This function will apply, when required to provide it, to all members of the Security Forces and Bodies, whether they depend on the central government or the Autonomous Communities or local entities, within the scope of their respective powers.*

Article 549.1 of the LOPJ specifies, in the following terms, the functions of the Judicial Police units:

> *"a) The investigation about those responsible and the circumstances of the criminal acts and the arrest of the first ones, giving an account immediately to the judicial and fiscal authority, in accordance with the provisions of the laws.*
> *b) Assistance to the judicial and fiscal authorities in any actions that must be carried out outside their headquarters and require the presence of the police.*
> *c) The material performance of the actions that require the exercise of coercion and order the judicial or fiscal authority.*
> *d) The guarantee of compliance with the orders and resolutions of the judicial or fiscal authority.*
>
> *e) Any other of the same nature in which his cooperation or assistance is necessary and ordered by the judicial or fiscal authority."*

Article 282 of the Criminal Procedure Law (LECRIM) states that:

> *"The Judicial Police's purpose, and it will be the obligation of all those who make it up, to find out the public crimes that are committed in their territory or demarcation; practice, according to his attributions, the necessary diligence to check and discover them*

criminals, and collect all the effects, instruments or evidence of the crime whose disappearance there would be a danger, making them available to the judicial authority."

Finally, according to Royal Decree 769/1987, of June 19, on the regulation of the judicial police (RDPJ), the general functions of the judicial police correspond to all members of the FFCCS, insofar as they must provide the col· collaboration required by the judicial authority or the Public Prosecutor's Office in actions aimed at investigating crimes or discovering or securing criminals, with strict subjection to the scope of their respective competences (article 1). It is added that the members of the FFCCS carry out the judicial police function at the request of the judicial authority, the Public Prosecutor or their police superiors, or on their own initiative through the latter, in the terms provided for in the articles following of the RDPJ (article 2 of the RDPJ).

Article 4 of the RDPJ provides that all the components of the FFCCS, whatever their nature and dependency, must practice on their own initiative and according to their respective attributions, the first steps of prevention and assurance as soon as they have news of the perpetration of the allegedly criminal act, and they must occupy and guard the objects that come from the crime or are related to its execution, and it is added that they must give an account to the judicial or fiscal authority, directly or through the organic units of the judicial police.

In this regulatory framework and given the powers attributed to the FFCCS as judicial police, as this Authority previously agreed in Opinions CNS 42/2014 and CNS 47/2018 which can be consulted on the website www.apdcat.cat , it can be considered sufficient legal authorization as provided in article 16.3 of Law 41/2002 is communicate data from the HC to the FFCCS when these, in the exercise of judicial police functions, accompany their request for a request of the judicial authority or the Prosecutor's Office.

But in addition, as is also stated in the aforementioned opinions, the judicial police can carry out proceedings related to allegedly criminal acts, without having, at first, a judicial request. In this sense, the aforementioned regulations include among the actions of the FFCCS as judicial police, those that are carried out at the request of police superiors, or even on the own initiative of the FFCCS agents, through these superiors, and not only those that are due to a previous judicial request. In any case, the regulations require that the judicial and fiscal authority be notified immediately (article 282 LECRIM, and article 549.1.a) LOPJ, cited).

This does not imply that the person responsible for the treatment, in this case the health center, must communicate to the FFCCS any information that is requested related to criminal acts, but it is necessary to determine what information the police force is enabled to demand

In this area, to determine which treatments can be carried out by police forces for the purposes of public safety or for the investigation of crimes, it is necessary to take into account Directive (EU) 2016/680 of the Parliament and of the Council, of 27 of April 2016, relating to the protection of natural persons with regard to the processing of personal data by the competent authorities for the purposes of prevention, research, detection or prosecution of criminal offenses or the execution of criminal sanctions, and the free circulation of this data and by which the Framework Decision 2008/977/JAI of the Council is repealed.

Given the lack of transposition of Directive 2016/680 by Spain (the member states of the European Union had to transpose this directive before May 6, 2018), in the case at hand it is necessary to take into account the forecasts of Organic Law 15/1999, of December 13, on the protection of personal data (LOPD), which remain temporarily in force in accordance with the fourth transitional provision of the LOPDGDD.

Therefore, to determine what is the information that the police force is authorized to collect for the exercise of its functions, it will be necessary to take into account article 22 of the LOPD, which enables the transfer of data for the fulfillment of *"police purposes".*

Thus, article 22.2 of the LOPD, provides the following:

> *"2. The collection and treatment for **police purposes** of personal data by the Security Forces and Bodies **without the consent of the persons affected** are limited to those cases and categories of data that are necessary for the **prevention of a real danger to public security or to the repression of criminal offences,** having to be stored in specific files established for that purpose, which must be classified by categories according to their degree of reliability."*

As this Authority has done on previous occasions, (among others in the Opinion CNS 50/2020) article 22.2 of the LOPD could enable the transfer of certain data that are not data of specially protected categories (art. 7.2 and 3 LOPD) to the FFCCS for the prevention of a real danger to the public security or for the suppression of criminal offences, without the need to link this transfer to a specific investigation and without the need to necessarily link it to the performance of judicial police functions by the FFCCS (art. 126 Constitution; arts 574 and 149.1 of Organic Law 6/1985, of July 1, of the Judiciary (LOPJ), art. 282 of the Criminal Procedure Law (LECRIM), and arts. 2 and 4 of the Royal Decree 769/1987, of June 19, regulating the judicial police).

In any case, in order for this transfer to be enabled, it will be necessary to comply with the requirements provided for in said article 22.2 of the LOPD, that is to say, that the request for data is limited to what is necessary for the prevention of a real danger to public safety or to the repression of criminal offences.

On the other hand, and for the purposes that interest us in this opinion, paragraph 3 of article 22 LOPD states the following:

> *"3. The collection and processing by the Security Forces and Bodies of the data, to which the sections 2 and 3 of article 7 refer, may be carried out **exclusively** in the cases where it is **absolutely necessary for the purposes of a specific investigation,** without prejudice to the control of the legality of the administrative action or of the obligation to resolve the claims made in their case by the interested parties who correspond to the jurisdictional bodies.*

In other words, article 22.3 of the LOPD establishes a specific requirement for the transfer of health data to the FFCCS, in particular, that this transfer is based and justified in the purposes of a specific investigation.

In the case at hand, the injury report contains special categories of data. Consequently, in view of the specific provision of article 22.3 of the LOPD, it can be concluded that health centers could transfer it, without the owner's consent, at the request of the FFCCS, only when they act as judicial police and within the framework of a specific investigation.

IV

This same criterion would be applicable in cases where the statement of injuries is the result of assaults of gender-based violence referred to in the second question posed by the body, as can be seen from the analysis of the sectoral regulations in this matter

Thus, Organic Law 1/2004, of December 28, on Comprehensive Protection Measures against Gender-Based Violence, with respect to the action of the FFCCS, in its article 32 establishes that the public authorities must collaborate and guarantee the organization of their actions in the prevention, assistance and prosecution of acts of gender violence, which must involve the health administrations, the Administration of Justice, the FFCCS as well as the social services and equality bodies.

Specifically, section 3 of this article 32 establishes:

> *"3. The administrations with health competences will promote the application, permanent updating and dissemination of protocols that contain uniform guidelines for health action, both in the public and private spheres, and in particular, the Protocol approved by the Interterritorial Council of the National Health System.*
>
> *Such protocols will promote prevention activities, early detection and continued intervention with women subjected to gender-based violence or at risk of experiencing it.*
>
> ***The protocols, in addition to referring to the procedures to be followed, will make express reference to relations with the Administration of Justice, in those cases in which there is evidence or well-founded suspicion of physical or psychological damage caused by these aggressions or abuses."***

This regulation foresees the creation in the FFCCS of specialized units in the prevention of gender violence and in the execution of the judicial measures adopted and with regard to the health administrations it refers to what the protocols established in the indeed they must to refer to relations with the Administration of Justice in cases where there is evidence or well-founded suspicion of physical or psychological damage caused by assaults or gender abuse.

In addition, the *"Protocol of action of the forces and bodies of security and of coordination with the judicial bodies for the protection of victims of domestic and gender violence (Approved by the Technical Commission of the National Commission of Coordination of the Judicial Police on June 28, 2005)"* provides that in the police investigation phase from the moment they become aware of facts that could constitute a criminal offense in the matter of gender and domestic violence, the FFCCS must carry out the actions investigation to determine the existence and intensity of risk situations for the victims. Among these actions it is foreseen that *"The existence of police interventions and/or complaints will be verified*

previous ones in relation to the victim or the alleged aggressor, as well as the antecedents of the latter and possible parts of the victim's injuries referred by the medical services". (point 1.A of the protocol).

In the same sense, the regulations governing the protection of minors, with regard to the actions of the public authorities in situations of aggression against minors, article 13.1 of the Organic Law 1/1996, of January 15, on the Legal Protection of Minors, which provides that:

> *"1. Any person or authority, and especially those who, by virtue of their profession or function, detect a situation of abuse, risk or possible abandonment of a minor, will report it to the authority or its closest agents, without prejudice to providing the immediate assistance required. "*

Law 14/2010, of 27 May, on rights and opportunities in childhood and adolescence states in its article 8 that the public authorities must protect minors from any form of physical or psychological abuse. To this end, article 83 establishes that the Administration of the Generalitat must draw up collaboration plans that guarantee, among others, the assistance and prosecution of the abuse of children and adolescents, according to the provisions of this article *"This collaboration must involve the health and education administrations, the administration of justice, the security forces and bodies and the social services".*

It therefore does not seem that the regulations for the protection of minors, regardless of the concreteness that may be established in the corresponding action protocols, establish any exception to the general regime derived from the LEC (art. 262) according to which those who have knowledge as a result of their profession of a situation that may cause damage (physical or psychological) to people, as a result of a possible criminal act, they must make it known to the judicial authorities (either a Judge, the Public Prosecutor's Office or, failing that, the judicial police). And likewise the FFCCS would be empowered to require this information under article 22.3 LOPD.

Therefore, it can be concluded that the statement of injuries resulting from situations of gender violence or assaults on minors, can be delivered, at the request of the FFCCS, without the consent of the affected persons, when they are acting as judicial police in the framework of a specific investigation, in accordance with what has been set out in the legal basis III of this opinion.

v

Finally, in cases where the Forces and Security Forces accompany the injured person and this is not in a position to take charge of the injury report, it is considered whether the report could be given to the police so that they can keep it until the time when the person concerned is, for example, at home. In this case, it is proposed to give the copy in a sealed envelope in front of the interested party, informing him of this circumstance to the extent that he can understand it.

Certainly the casuistry can be very varied and there can be situations in which the person treated in the health center cannot take charge of the injury report. Health centers in accordance with article 7 of Law 41/2002, basic, on patient autonomy must guarantee the confidentiality of patients' health data and must prepare protocolized procedures

that guarantee legal access to patient data. These hospital protocols must establish the procedure to be followed in each case, to guarantee both the safety of people who may have been victims of an attack and the protection of their privacy.

Also, the health center as the person responsible for the treatment must comply with the principles of data protection (art. 5.1 RGPD), and must be able to demonstrate this compliance ("proactive responsibility" principle).

In this context, the delivery of the injury report in a sealed envelope to an FFCCS agent when the interested party cannot take care of it, can be an appropriate procedure that respects data protection regulations, as long as it is guaranteed that this delivery has as its purpose its deposit until the moment when the interested person can get it and the envelope is closed and sealed.

In this sense, the already mentioned article 4 of the RDPJ attributes to the components of the FFCCS, whatever their nature and dependency, the first steps of prevention and assurance so that they have news of the perpetration of the allegedly criminal act, to guard the objects that come from the crime or are related to its execution reporting to the judicial or fiscal authority, directly or through the organic units of the judicial police. This custody could be extended, in this case to the statement of injuries of the person cared for.

However, to the extent that the injury report is incorporated into the patient's medical record, in cases where neither the patient nor any other related person can take care of it, it may be good practice for the copy of the statement of injuries addressed to the person concerned remains in his medical history and that only this circumstance is communicated to him so that the affected person can obtain it at the moment he considers appropriate. This option is particularly recommended when access to this information can be made directly by the person concerned through electronic means (for example, through the personal folder "My health").

Conclusions

The FFCCS may obtain a copy of the statement of injuries, including injuries linked to situations of gender-based violence or assaults on minors, without the consent of the data subject, when acting in the exercise of judicial police functions for a specific investigation.

The delivery to FFCCS agents of the statement of injuries in a closed and sealed envelope when the interested party cannot take care of it can be a procedure appropriate to the data protection regulations as long as its purpose is only to deposit it until at the time when the interested person can take care of it. This, without prejudice to the fact that other practices may be more advisable, such as indicating to the affected person that they can obtain a copy of the statement by accessing their medical history.

Barcelona March 26, 2021