

CNS17/2021

Opinion in relation to the consultation of a body in the field of health, on the opposition of a patient under the age of 16, to access to his clinical history by his mother

A letter from a body in the field of health is presented to the Catalan Data Protection Authority, in which a report is requested to this Authority on the opposition of a patient under the age of 16, to access to his medical history by his mother.

The consultation explains that the minor would have requested that his father be able to have access to his medical history, but not his mother.

The consultation says it does not know the reason why the minor is making this request, and adds that there is no record of any kind of conflictual relationship or abuse. For this reason, in the consultation it is considered correct for the health center to ask the patient the reason why he opposes this access, to assess whether there is really a detriment to the patient in the event of providing the data, and requests an opinion in this regard .

Having analyzed the request, in view of the current applicable regulations, and in accordance with the report of the Legal Counsel, the following is ruled.

I

(...)

II

The consultation explains that a 16-year-old user would have requested that only his father have access to his medical history, but not his mother.

According to the consultation, the reason why the minor patient does not want to allow the mother access to the medical history (HC) is unknown, adding that there is no record of any kind of conflictual relationship or abuse.

The consultation adds that we would have recommended the health center to ask the data holder to justify the reason why he objects to his mother's access to his health data to assess whether there really is there is a detriment if this data is provided to you.

Given the consultation in these terms, it should be borne in mind that, according to Regulation (EU) 2016/679, of April 27, General Data Protection Regulation (RGPD), personal data is *"all information about a natural person identified or identifiable ("the interested party"); Any person whose identity can be determined, directly or indirectly, in particular by means of an identifier, such as a number, a*

identification number, location data, an online identifier or one or more elements of the physical, physiological, genetic, psychological, economic, cultural or social identity of said person;

Therefore, the processing of data (art. 4.2 RGD) of natural persons who receive assistance in health centers is subject to the principles and guarantees of the personal data protection regulations (RGD and Organic Law 3/2018, of 5 December, of protection of personal data and guarantee of digital rights (LOPDGDD)).

Given that, in the case examined, the owner of the personal data contained in the clinical history (art. 9.1 of Law 21/2000, of December 29, on the rights of information concerning the patient's health and autonomy, and clinical documentation) is a minor, it is necessary to remember at the outset the provision of article 8 of the RGD:

"1. When article 6, section 1, letter a) is applied, in relation to the direct offer to children of services of the information society, the treatment of the personal data of a child will be considered lawful when he is at least 16 years old. If the child is under 16 years of age, such treatment will only be considered lawful if consent is given or authorized by the holder of parental authority or guardianship over the child, and only to the extent that it is given or authorized.

The Member States may establish by law a lower age for such purposes, provided that this is not lower than 13 years."

Article 7 of the LOPDGDD provides for the following:

"1. The treatment of the personal data of a minor can only be based on his consent when he is over fourteen years old.

The cases in which the law requires the assistance of the holders of parental authority or guardianship for the celebration of the legal act or business in whose context consent for the treatment is obtained are excepted.

2. The treatment of the data of minors under fourteen years of age, based on consent, will only be lawful if the holder of parental authority or guardianship is included, with the scope determined by the holders of parental authority or guardianship."

Thus, if the data protection regulations have recognized minors over the age of 14 the possibility to consent to the processing of their data, as a logical consequence the same regulations recognize these minors over the age of 14 the ability to exercise the rights of informative self-determination. Among others, the RGD provides for the right of access (art. 15), the right of rectification (art. 16), the right of deletion or "*right to be forgotten*" (art. 17), and the right of opposition (art. 21), the exercise of which corresponds to the interested person, owner of the information (art. 4.1 RGD).

For the purposes of article 7.1 LOPDGDD, it is necessary to take into account the provisions of the patient autonomy legislation, which gives minors a certain capacity to give "informed consent" for themselves in relation to interventions in the field of their health (art. 6 Law 21/2000).

According to article 7.2.d) of Law 21/2000, referring to different cases of granting consent by substitution:

*"d) In the case of minors, if they are not competent, neither intellectually nor emotionally, to understand the scope of the intervention on their own health, consent must be given by the minor's representative, having heard, in any case, his opinion if he is over twelve years old. In the rest of the cases, and especially in cases of emancipated minors and **adolescents over sixteen years of age**, the minor must personally give their consent."*

This legal provision does not properly refer to the capacity to consent or to exercise the right of access in matters of personal data protection, but to the provision of informed consent, understood as the specific and free consent for a certain medical intervention, having been the patient previously informed, and not to the consent for the processing of personal data, but in accordance with the second paragraph of the article, this age limit would apply as it is the age established for the *"business legal context in which the consent for the treatment is obtained"*.

In this area, minors over the age of 14 can give informed consent if they have a sufficient degree of maturity or competence. Consequently, they can also access their health data to be able to make decisions (exercise their rights of informative self-determination).

In the event that minors over the age of 14 do not have a sufficient degree of maturity, it must be understood, for the purposes of article 7.1 of the LOPDGDD, that the age for consent would be raised to 16 years. Thus, with regard to minors over the age of 16, they must necessarily be able to access their own health information, and exercise their informational self-determination rights, since the sectoral regulations provide that they must provide consent for themselves Find out more.

Given that, according to the inquiry, the minor is 16 years old, it is clear that it is up to him to give informed consent for himself and, therefore, not only must he be able to access his own health information, but he can exercise for himself the rest of the informational self-determination rights that correspond to you as the owner of the information, specifically, the right of opposition (art. 21 RGPD), to which we will refer later.

III

Having said that, it must be borne in mind that the parents or legal representatives of a minor, regardless of the age of the minor, also exercise the rights of self-determination on behalf and representation of the minor and, in particular, must be able to exercise the right of access in the name and representation of the minor, and access the personal data of this minor.

According to article 12 of the LOPDGDD:

*"1. The rights recognized in articles 15 to 22 of Regulation (EU) 2016/679 may be exercised directly or through a **legal** or voluntary representative."*

(...)

5. When the laws applicable to certain treatments establish a special regime that affects the exercise of the rights provided for in Chapter III of Regulation (UE) 2016/679, it will be in accordance with those provisions.

6. In any case, the holders of parental authority may exercise the rights of access, rectification, cancellation, opposition or any other that may correspond to them in the context of this organic law in the name and representation of children under the age of fourteen.

(...).”

Article 12.6 of the LOPDGDD provides that "in any case" holders of parental authority may exercise their rights in relation to children under 14 years of age. However, this regulatory provision does not exclude the possibility that these same holders may exercise their rights in relation to minors over the age of 14, taking into account the provisions of the applicable sectoral regulations.

Thus, the healthcare regulations expressly provide for the possibility that the patient's right of access to the clinical history can also be exercised by representation, as long as it is duly accredited (article 13.3 of Law 21/2000, of 29 December, on the rights of information concerning the patient's health and autonomy, and clinical documentation, and article 18.2 of Law 41/2002, of November 14, basic, regulating patient autonomy and rights and obligations regarding information and clinical documentation).

As this Authority has decided on previous occasions (among others, opinions CNS 33/2017, CNS 58/2017, CNS 10/2018, or CNS 9/2019, which can be consulted on the Authority's website, www.apdcat.cat), the regulations state that the parents are the holders of parental authority over unemancipated minor children (Article 236-1 of Book Two of the Civil Code of Catalonia, hereinafter CCC).

The exercise of parental authority over children entails the legal representation of these (art. 236-18 CCC). The second section of the same article 236-18, excludes from the legal representation of children, among others, *"the acts relating to the rights of personality, unless the laws that regulate them establish something else."*

Therefore, the parents of minors, to the extent that they exercise their legal representation based on the provisions of the regulations, must be able to exercise the rights of informative self-determination on behalf and representation of the minors and, consequently, they must be able to have access to minors' health information (HC) and, where appropriate, exercise the rest of the rights provided for in the regulations.

In this sense, parental authority is an inexcusable function that is exercised in the interest of the children (art. 236-2 CCC), and would justify access to the minor's information and, where appropriate, the exercise of rights on behalf and representation thereof.

To this it should be added that article 236-17 CCC, which regulates relations between parents and children, states that: *"1. Parents, by virtue of their parental responsibilities, must take care of their children, provide them with food in the broadest sense, live with them, educate them and provide them with training*

comprehensive (...)." This duty of care regarding children obviously includes care regarding their state of health.

In fact, Law 21/2000 itself provides that *"if the patient, in the judgment of the doctor responsible for the assistance, is not competent to understand the information, because he is in a physical or mental state that does not allow him to -if you are in charge of your situation, you must also inform your family members or the people who are related to you"* (art. 3.3). Obviously, this situation in many cases can be predictable with respect to minors.

For all this, it is clear that the duties that the legal system attributes to the holders of parental authority enable them to access the clinical documentation that affects the minors under their authority and, by extension, the exercise of the rest of the informational self-determination rights on behalf of minors, including minors who are over 14 years old.

In any case, neither the provisions of the CCC cited, nor the rest of the regulations studied, provide that the exercise of rights by the holders of parental authority in the area in question is subject to the prior authorization or approval of the minor himself. Among other things, because this would distort the actual exercise and purpose of parental authority.

IV

It is in this context that it is necessary to analyze the request that a minor of 16 years of age would have made to a health center in order to oppose his mother accessing the data of his HC.

From the information available, it seems that the minor would have exercised a right of opposition in order to prevent specific treatment from occurring, such as the communication of data from his HC to his mother or, in short, to prevent the mother from exercising a right of access to the child's HC clinic, by representation.

According to article 21 of the RGPD:

*"1. The interested party will have the right to object at any time, for reasons related to his particular situation, to personal data concerning him being the object of a treatment based on the provisions of article 6, section 1, letters e) of), including the elaboration of profiles on the basis of these provisions. **The person in charge of the treatment will stop processing the personal data, unless it proves compelling legitimate reasons for the treatment that prevail over the interests, rights and freedoms of the interested party, or for the formulation, exercise or defense of claims.**"*

The processing of personal data in the context of the health care of a health center of the public care network has as its legal basis the fulfillment of a mission carried out in the public interest or in the exercise of public powers by the person responsible for the treatment (art. 6.1.e) RGPD). Therefore, with respect to the processing of data of the HC, its owner can exercise the right of opposition in the terms of the cited article 21, as it is a health center of the public health network.

As has been said, taking into account the applicable regulations, a minor over the age of 16 must be recognized with the possibility of exercising, among others, the right of opposition, with the aim in this case of not allow access to your HC data by your mother.

According to the consultation, the health center does not know the reason for the minor's request for opposition, as well as any circumstance that could justify the prevalence of his opposition to access to his HC by the mother, above the exercise of the mother's right of access, by representation, to the HC of the minor child.

Specifically, the consultation states that *"We do not know the reason why the boy does not want access to the mother. We are not aware of any conflicting relationship or abuse."*

Faced with the exercise of a right of opposition, the person in charge (art. 4.7 RGPD), in this case the health center, must make a weighting based on the information it has, and the applicable regulations, for in order to give an adequate response to the data owner. In any case, Article 21 of the RGPD only requires the applicant to exercise the right of opposition based on reasons related to his personal situation. It is therefore a burden for the applicant to state the reasons that underpin the request, but their absence does not entail the inadmissibility of the request, nor does it appear a duty to request an extension of the information, but rather it is a circumstance, the lack of concreteness, that will have to be taken into account when making the weighting required by article 21 RGPD.

In the case at hand, it is not known that the applicant has stated what these reasons are, but taking into account the configuration of the right of opposition (art. 21 RGPD), it is not necessary or essential that the center address to the minor to ask him to specify or justify his opposition request.

On the other hand, the same article 21 RGPD provides that the controller must stop processing personal data (in this case, in the sense of not allowing access by the mother of the minor to the HC), unless he can prove "imperious legitimate reasons" to continue treating them.

Therefore, the health center, as responsible not only for the management of HC based on the patient autonomy legislation, but also as responsible for providing the minor with adequate health care, must assess whether, despite the request of the minor, there are compelling reasons to maintain the treatment and facilitate the mother's access to the HC of the minor, in order to ensure the provision of adequate health care, which is the main use of the HC (art. 11.1 Law 21/2000).

In this sense, as has been pointed out in the Legal Basis III of this opinion, in a case like the present one, the compelling legitimate reasons to maintain the mother's access could be based on the inexcusable duties that the legal system imposes to the parents or legal guardians of minors, who must take care of the minor, and, beyond that, the mother's access, especially depending on the type of pathology being treated, may be positive in the provision of adequate assistance, always for the benefit of the minor, given that, according to article 5.1 of Law 14/2010, of May 27, on rights and opportunities in childhood and

adolescence (LDOIA), *"The best interest of the child or adolescent must be the inspiring and foundational principle of public actions"*.

That being the case, and considering that the applicant does not present specific reasons justifying his opposition to the mother being able to access the medical history, it seems that the compelling legitimate reasons that advise maintaining the possibility for the mother to access should prevail in the medical history as long as the minor lasts and retains parental authority.

As this Authority has highlighted (Opinions CNS 58/2017 and CNS 10/2018), in the event that parental authority is suspended - as can happen, for example, as a result of the instruction of a deprivation procedure in the terms provided for in the regulations (article 228-1 CCC, and arts. 106 and s. LDOIA)-, the exercise of the rights in question by the person or persons exercising said parental authority would be impossible, at least while it lasts the suspension or deprivation of said power.

A different issue is that, although it is not mandatory for the health center to require that the personal situation that motivates the request be specified, a different assessment can be made if the center can obtain more information, which the applicant can provide, about the personal situation that justifies your request. In this case, a new assessment would have to be made taking into account the circumstances that are alleged.

In this regard, as this Authority has agreed (Opinion CNS 10/2018, and Opinion 9/2019), it is necessary to take into account article 17.1 of the LDOIA, according to which: *"children and adolescents can exercise and defend their rights themselves, unless the law limits this exercise. In any case, they can do it through their legal representatives, as long as they don't have interests that conflict with their own."*

Therefore, the legal system foresees certain situations in which the principle of the best interests of the minor would allow parents or guardians to exclude or limit access to certain medical information of the minor.

However, as the consultation itself states, there is no evidence that circumstances of this type exist in the case examined. Therefore, and without prejudice to the fact that the center may wish to request additional information from the minor that may allow a different assessment to be made, it is not appreciated that the opposition request should prevail over the aforementioned compelling legitimate interests.

In accordance with the considerations made in this opinion the following are made,

Conclusions

Taking into account the configuration of the right of opposition (art. 21 RGPD), it is not essential that the center addresses the minor to ask him to specify or justify his request, for the purposes of making a decision on the exercise of this right. This, without prejudice to the fact that, despite not being mandatory, the center may request additional information from the minor.

With the information available, in a case like the one raised the existence of legitimate reasons imperatives, specified in the rights and obligations of the holders of parental authority and in the repercussions that this may have on the provision of adequate assistance, always for the benefit of the minor, may justify the maintenance of the mother's access to clinical history data.

Barcelona, March 26, 2021

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