CNS 19/2021

Opinion in relation to the consultation of a body in the field of health regarding the request for access to the clinical history of a minor by a social educator

A letter from a body in the field of health is presented to the Catalan Data Protection Authority, requesting a report from this Authority on the request
of access to the medical history of a minor, which has been formulated by a social educator who, according to the consultation, works at "ABSS. (...).”

The consultation explains that a social educator has requested by email from a health center, reports and medical treatments of a minor, without explaining the reason for the request, and that there is no consent either of the minor's legal representatives or the minor himself.

The consultation explains that, apart from considering that the request is made by means that guarantee the identification of the person requesting it, the claimant has been required to address the request and explain the reasons that would justify the transfer of the data.

In this context, the query asks if "the transfer could be justified if it proves that the minor is in a situation of risk and for his benefit, provided that the information provided is strictly necessary for those functions".

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 social educator who works at "the ABSS. (...)", it should requested by e-mail to a health center, reports and medical treatments of a minor's medical history, without explaining the reason for the request.

In this context, the consultation raises whether "the transfer could be justified if it proves that the minor is in a situation of risk and for his benefit, provided that the information provided is strictly necessary for those functions".

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), are
personal data "all information about an identified natural person or
identifiable ("the interested party"); every person will be considered an identifiable natural person whose identity can be determined, directly or indirectly, in particular by means of a
identifier, como por ejemplo a number, an identification number, data from
location, an online identifier or one or more elements of identity
physical, physiological, genetic, psychological, economic, cultural or social of said person;

According to article 4.15 of the RGPD, it is data relating to health: “personal data
relating to the physical or mental health of a natural person, including the provision of health care services, which reveal information about your health status".

Considering this definition, and Recital 35 of the RGPD, it is obvious that information relating to medical reports and treatments relating to a patient, in this case a minor, is health information of that patient, which is particularly protected by the regulations.

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

Therefore, communicating information about the minor to a social educator from a basic area of social services (ABSS), means providing information related to the health and the care treatment of the affected person (art. 4.1 RGPD). This information is contained in your medical history (HC), the content of which is regulated in the sector regulations (article 10.1 Law 21/2000, of December 29, on the rights to information concerning health and autonomy of the patient, and the clinical documentation; article 15.2 Law 41/2002, of November 14, basic regulation of patient autonomy and rights and obligations in matters of information and clinical documentation).

Specifically, the HC collects the set of documents relating to the healthcare process for each patient while identifying the doctors and other healthcare professionals who have intervened (art. 9.1 of Law 21/2000).

III

Any processing of personal data must comply with the principle of legality (art. 5.1.a) RGPD). According to article 6.1 of the RGPD:

> "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; (…)."

The query refers to the communication of a patient's health data, so it is also necessary to take into account article 9 of the RGPD, which establishes the general prohibition of the processing of personal data of various categories, among others, of data relating to health (section 1). Section 2 of the same article 9 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 specified purposes, (...);*

(...)
h) the treatment is necessary for the purposes of preventive or occupational medicine, evaluation of the worker's work capacity, medical diagnosis, **provision healthcare or social assistance or treatment,** or management of them systems and services of health and social assistance, on the basis of the Law of the Union or of the Member States or by virtue of a contract with a health professional and without prejudice to the conditions and guarantees contemplated in section 3;

(…)"

According to article 9, paragraph 3, of the RGPD:

"The personal data referred to in section 1 may be treated for the purposes mentioned in section 2, letter h), when its treatment is carried out by a professional subject to the obligation of professional secrecy, or under his responsibility, in accordance with the Law of the Union or of the Member States or with the rules established by the competent national organisms, or by any other person also subject to the obligation of secrecy in accordance with the Law of the Union or of the Member States or of the rules established by the competent national bodies."

In relation to this, it is necessary to take into account article 8 of the LOPDGDD, according to which the rule that enables the treatment based on the fulfillment of a legal obligation required of the person in charge (art. 6.1.c) RGPD), or treatment based on the fulfillment of a mission carried out in the public interest or in the exercise of public powers (art. 6.1.e) RGPD), it will have to be a norm with the rank of law.

Likewise, article 9 of the LOPDGDD provides that:

"1. For the purposes of article 9.2.a) of Regulation (EU) 2016/679, in order to avoid discriminatory situations, the consent of the affected person alone will not suffice lift the ban on data processing whose main purpose is to identify your ideology, trade union affiliation, religion, sexual orientation, beliefs or racial or ethnic origin.

The provisions of the previous paragraph will not prevent the processing of said data under the remaining assumptions contemplated in article 9.2 of Regulation (EU) 2016/679, when applicable.

2. The processing of data contemplated in letters g), h) ei) of article 9.2 of Regulation (EU) 2016/679 based on Spanish law must be covered by a rule with the rank of law, which may establish additional relative requirements to your security and confidentiality.

In particular, said rule may cover the treatment of data in the field of health when this is required by the management of public and private healthcare and social systems and services, or the execution of an insurance contract of which the affected be part."

The explicit consent of those affected, in this case, the parents or legal guardians of a minor or, where applicable, the minor himself, depending on the latter's age (art. 8.1 RGPD and art. 7 LOPDGDD), could be a sufficient legal basis for a communication of certain data from the HC of the minor.

However, according to the consultation, there is no consent from the legal guardians, nor from the minor himself in case he can give it personally (a possibility that, since the consultation does not specify the minor's age, cannot be assessed either).

In the absence of the explicit consent of the parents or legal guardians of the minor or, where appropriate, of the minor himself (art. 9.2.a) RGPD), or of the concurrence of other legal bases, the communication of the data referred to a minor of age could have a sufficient legal basis if the treatment is carried out within the framework of the fulfillment of a mission in the public interest (art. 6.1.e) RGPD) and is necessary for the provision of assistance or treatment of health or social (art. 9.2.h) RGPD), and the treatment is carried out by professionals subject to the obligation of professional secrecy in accordance with the Law of the EU or the Member States (art. 9.3 RGPD), possibility that is analyzed below.

IV

According to the inquiry, the request for access to the minor's HC data would have been made by a social worker from "ABSS. (...).”

From the information provided, it seems that the query refers to a basic area of social services (ABSS), depending on the City Council of (...).

For the purposes of analyzing the concurrence of authorization for the communication of data in the field of the provision of social services, it is necessary to take into account the provisions of the sectoral regulations, in particular, Law 12/2007, of 11 of October, of social services (henceforth, LSS).

According to article 15.1 of the LSS the public system of social services is structured into basic social services and specialized social services.

Basic social services are organized territorially and include "basic equipment" (EBAS), home help and teleassistance services and non-residential socio-educational intervention services for children and adolescents (art. 16.2 LSS).

With regard to the basic areas of social services (ABSS), to which the consultation refers, according to article 34 of the LSS:

> "1. The basic areas of social services are the primary unit of social care for the purposes of providing basic social services.
> 2. The basic area of social services is organized on a minimum population of twenty thousand inhabitants, taking the municipality as a basis.
> 3. The basic area of social services must group municipalities with less than twenty thousand inhabitants. In this case, the management corresponds to the county or the associative body created especially for this purpose.
> 4. Municipalities with more than twenty thousand inhabitants may have more than one basic area of social services, depending on the number of inhabitants and social needs."

According to the second additional provision of the LSS:

> "(...).
> 2. The 2008-2009 Social Services Portfolio must include at least the requirements next:
> a) The basic areas of social services must have an endowment of three diplomas in social work and two diplomas in social education for every fifteen thousand inhabitants.

Therefore, municipalities with a population of more than twenty thousand inhabitants - as would be the case of the ABSS referred to in the consultation given the information provided - have powers in terms of social services based on the provisions of the LSS and the Social Services Portfolio (Decree 142/2010, of 11 October).

According to article 5.1 of Decree 27/2003, of January 21, on primary social care: "The social services of primary care of the Basic Social Services Network of Public Responsibility are provided in the Basic Area of Services Social. The ABSS is the elementary territorial unit for programming, provision and management of social services."

Annex 1 of the same Decree 27/2003 provides the following, in relation to basic primary social care services:

> "Definition: an organized and coordinated set of professional actions, carried out by the respective technical team, whose purpose is to promote the mechanisms to know, prevent and intervene in people and/or families.
>
> Objectives: guarantee and improve social well-being and promote the integration of people and/or families.
>
> Functions:
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> Detection and prevention of situations of social risk or exclusion.
> Reception and analysis of demands relating to the social needs of the corresponding territorial area.
> Information, assessment, guidance and advice.
> Application of actions or interventions to support and monitor individuals and/or families.
> Management and coordination of the services corresponding to the first level.
> Processing and monitoring of programs and benefits that require your intervention.
>
> Community social work.
> Processing referral proposals to social services for specialized care or other care networks.
>
> Recipients: all people and/or families who live or are in the respective territorial areas and especially those people and/or families with developmental and social integration difficulties or lack of personal autonomy.
>
> Personnel: have a basic interprofessional team made up of at least two social assistants/ graduates in social work and one social educator for every 20,000 inhabitants. (...).”

Given that the provision of social services encompasses several actions in the field of protection of minors, it is also necessary to refer to Law 14/2010, of 27 May, on the rights and opportunities in childhood and adolescence (LDOIA), specifically, in relation to the management of situations of risk for minors, which is the area in which the consultation places the request for access to minor information by the ABSS.

As explained in the preamble of the LDOIA, this law sets up a decentralized system for the protection of minors, which is based on the distinction between situations of helplessness (article 98 and article 105 et seq.) and situations of risk (article 99 et seq.), maintaining the competence of the Generalitat when it comes to helpless children and adolescents and attributing it to the competent local bodies if it affects children or adolescents in a situation of risk. Article 99 LDOIA provides that:

> **"The local administration must intervene if it detects a situation of risk for a child or adolescent** who is in its territory; must adopt the appropriate measures to act against this situation, in accordance with the regulations established by this law, with the regulations of the Generalitat that develops it and with the legislation on social services."

In relation to the management provided for in the regulations regarding the risk situations of minors (arts. 102 et seq. LDOIA), article 103 of the LDOIA provides for the following:

> "1. The **basic social services must assess the existence of a situation of risk** and promote, where appropriate, the measures and resources of social and educational attention that allow to reduce or eliminate the situation of risk by seeking the collaboration of the parents or of the holders of tutelage or guardianship.
>
> 2. The basic social services must designate a professional of reference, for each case, of the child or adolescent, who is responsible for evaluating the situation and following up.
>
> (...)."

Thus, the local administration, through the ABSS, should be able to access and process certain personal information in order to be able to assess the risk situation in which a minor finds himself, manage it and propose the relevant measures, and to monitor the minor accordingly. This, without prejudice to the fact that, in certain cases, the case must be referred to specialized social services (arts. 15 et seq. LSS and art. 103, sections 3 and 4 LDOIA).

In this context, Article 100 of the LDOIA establishes the duty of communication and reporting to basic or specialized social services, both for citizens in general (art. 100.1) and for certain professionals who are aware of the risk situation or neglect of children or adolescents. Section 3 of this article provides that:

> "3. All professionals, especially **health,** social services and education professionals, must intervene when they are aware of the situation of risk or helplessness in which a child or adolescent finds himself, in accordance with the specific protocols and in collaboration and coordination with the body of the Generalitat competent for the protection of children and adolescents. **This obligation includes providing the information and documentation needed to assess the situation of the child or adolescent.**
>
> (...)."

For all of the above, the communication of certain data from the HC of a minor to the ABSS professionals who, depending on their scope of municipal action, are responsible for attending to the minor who is in a situation of risk, may have sufficient authorization (eg arts. 6.1.e) and 9.2.h) RGPD), taking into account the applicable regulatory framework (LSS and LDOIA).

Given the regulations studied, the communication of certain health data available to the health center that attends the minor could be enabled, if this is necessary for the purpose of assessing and managing their risk situation, based on the functions that they correspond to the ABSS in terms of social services and, specifically, the protection of minors.

This, without prejudice to compliance with the rest of the principles and obligations of the regulations of data protection, which we refer to below.

v

According to the consultation, apart from requiring the social educator to make the request by means that allow to guarantee the identity of the person requesting it, she would have been required to "shorten the request a little and explain the reasons that would justify the transfer of the data."

According to article 5.1 of Law 21/2000, "every person has the right to respect the confidentiality of data that refer to your health. Likewise, you have the right to no one who is not authorized can access it unless it is protected by the legislation in force" (art. 5.1). In the same sense, article 7 of Law 41/2002.

Given that the regulations especially protect the confidentiality of this information and the privacy of both the patient himself and third parties (art. 5.1.f) RGPD, and art. 13.2 Law 21/2000), the person in charge must be able to verify that access to the HC by third parties, in this case, certain professionals of an ABSS, is justified.

From the perspective of data protection, the principle of proactive responsibility (art. 5.2 RGPD), requires that the person in charge must comply with the principles of data protection (art. 5.1 RGPD) and must be able to demonstrate this fulfillment

Thus, following requests such as the one referred to in the consultation, it seems reasonable that the health center, as responsible, requests the necessary information to be able to check the terms of the request, and if sufficient qualification for the data communication for the purposes of the principle of legality, and to comply with the principle of proactive responsibility.

Therefore, it is relevant, as the consultation points out, that the health center requires that the request for access to the minor's HC data be formulated in terms that "guarantee the person who requests it", and require that the person only ·applicant (in this case, a social educator from the ABSS) proves her identity, as well as the qualification from the ABSS to obtain information from the minor's HC. In other words, for the center to request, as the consultation points out, "the reasons that would justify the transfer of the data".

In this way, the health center, as responsible for the HC, will be able to verify the appropriateness of communicating personal information of this patient and, if applicable, of third parties, to the ABSS.

VI

The communication of data from the HC of the minor must comply with the principle of minimization, according to which the data must be adequate, relevant and limited to what is necessary in relation to the purposes of the treatment (art. 5.1.c) RGPD).

Based on this principle, the communication of data to the ABSS must be limited to those data of the HC of the minor necessary to be able to assess the risk situation of the minor, based on the functions that correspond to the ABSS .

The weighting must be particularly careful in the case examined, given the protection provided by the regulations in relation to health information, to which we have referred (art. 9 RGPD).

In the case at hand, the health center that attends to the minor has his health data, contained in the HC (arts. 9 and 10 of Law 21/2000). Apart from patient identification data and assistance, the HC contains a set of clinical care data (personal and family history, clinical procedures, medical treatments, information on surgical interventions, etc.), as well as social data (social report), which can refer to very diverse issues, relating to the health of the

minor

From what emerges from the consultation, it is also not clear if the request for information refers only to "medical reports and treatments" referring to the minor himself, or if the social educator's request also refers to data contained in the minor's HC, referring to third parties that may appear there. As this Authority has done in the past (among others, in Opinions CNS 1/2009 or CNS 26/2013, referring to the transfer of patient data to social services), it must be borne in mind that the HC of the minor may contain health data not only of him, but also of the child's parents or biological relatives (family history). Risk situations for minors are those in which their development and well-being may be limited or harmed by "any personal, social or family circumstance" (art. 102.1 LDOIA). Therefore, some risk situations, in order to be assessed correctly, may require the processing of certain data from the parents or guardians, including, where appropriate, health data. Given the available information, this possibility cannot be ruled out.

At the outset, from the perspective of the principle of minimization, it should be remembered that, although the communication of certain data from the child's HC to the ABSS competent to attend to this child may have sufficient qualification given the applicable regulations, this does not implies that any medical report must be communicated, or information about any treatment or medical process that the minor has undergone.

In the event that the request made refers to the complete HC of the minor which, given the terms of the consultation, cannot be ruled out, access to health data of these parents or biological relatives would be requested, that may be included in the child's HC.

In this sense, the same article 24.2 of the LDOIA makes explicit reference to the fact that the data that must be transferred, in the terms provided for in said article, without the consent of those affected, are not only those of the minors themselves, but also those of "their parents, guardians or guardians".

As an example, article 102.2 of the LDOIA, when defining risk situations, includes several that could require the processing of health data of the parents or guardians or guardians of the minor. Among others, the lack of physical or mental attention of the child or adolescent by the parents or by the holders of guardianship or guardianship, which entails a slight harm to the physical or emotional health of the child or the adolescent, as well as the serious difficulty in providing adequate physical and mental care to the child or adolescent by the parents or guardians.
The evaluation of these or other cases could therefore make it necessary to have health data of the minor's parents, guardians or carers.

For the purposes that matter, and given the terms of the social educator's request according to the consultation, we cannot rule out that access to data is being requested
of these third parties related to the minor, to assess the risk situation of the latter.

Consequently, and without prejudice to the fact that there is sufficient authorization to communicate information to the ABSS in the case raised, based on the principle of minimizing the communication of personal information, both of the minor and, where appropriate, of related third parties with this, it will have to be limited to that which may be pertinent and relevant for a the evaluation and follow-up of the specific risk situation of the minor that must be carried out the ABSS.

For all this, as has been pointed out, it may be relevant for the health center to ask for the clarifications it considers necessary from the ABSS to specify the terms of the request and comply with the minimization principle.

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

Conclusions

The communication of data from the medical history of a minor to the ABSS may have sufficient authorization (eg arts. 6.1.e) and 9.2.h) RGPD, in relation to the LSS and the LDOIA), with the purpose of attending to the minor and evaluating and managing his risk situation, and always in accordance with the principle of minimization. For these purposes, it is justified to ask for proof of the identity of the person making the claim.

Barcelona, April 8, 2021