CNS 20/2021

Opinion in relation to the inquiry made by a body in the field of health regarding a request submitted by the Mossos d'esquadra asking for the medical report of a patient victim of a homicide attempt.

A query from a body in the field of health is presented to the Catalan Data Protection Authority regarding a request submitted by the Mossos d'esquadra asking for the medical report of a patient victim of an attempted 'homicide

In the consultation, it is stated that the police sent them a letter in which, without providing the number of judicial proceedings (only police), they asked for the latest medical report of a certain patient in a hospital of the entity, as well as knowing whether the patient was admitted.

We consider that the request of the officers was not sufficiently specific because the reference to the "last medical report" is very generic, it did not specify the date of the incident or state it clearly he was the victim, although it could be deduced".

As indicated, the circumstance was that the patient was a foreigner, had just left the ICU and needed an interpreter to communicate, so that asking for his consent to provide this data was complicated.

In this context, the representative of us requests the Authority:

> "We request an opinion to know if in cases like this (blood crimes, terrorism, etc.) it would be possible to provide the minimum health data as well as the patient's room number and always with the express commitment to communicate the matter to Prosecutor or in court as soon as possible."

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

He asks us if in cases of blood crimes, terrorism, etc. the Mossos d'Esquadra could be provided with the minimum health data as well as the patient's room number without their consent and without submitting a judicial request but with the express commitment to communicate the matter to the Prosecutor's Office or the court as soon as possible.

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), personal data is "all information about an identified natural person 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, an identification number, location data, an online identifier or one or more elements of identity, shall be considered an identifiable physical person physical, physiological, genetic, psychological, economic, cultural or social of said person;

In accordance with article 4.15) of the RGPD, data relating to health are “personal data relating to the physical or mental health of a natural person, including the provision of health care services, which reveal information about their state of health; "

The information to which the query refers, that is to say the patient's health data, as well as the room number he occupies, as this Authority has previously highlighted in Opinion CNS 37/2018 which can be consulted in following link www.apdcat.cat, they are personal health data and therefore special categories of data.

The processing of data carried out by a health center, whether in this case the data of patients, as in general any other processing of personal data, including transfers that may be made to a third party, is subject to the 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.

In the case raised in the consultation on the possibility that the information contained in the HC of patient data may be transferred to the Mossos d'Esquadra without the consent of the interested party for a purpose other than that for which they were collected, such as purposes related to the functions that the regulatory framework attributes to the FFCCS, this must be taken into account regulatory framework 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 (HC).

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:

Regarding the uses and possible access to the HC, article 16 of Law 41/2002 regulates the possible access to the information contained in the HC 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 are the specific functions of the police of the Generalitat - police forces and the surveillance and custody of its own buildings, facilities and dependencies, those of the public security police and public order, those of the administrative police and those corresponding to it 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; carry out, according to their attributions, the necessary diligence to check and discover the criminals, and collect all the effects, instruments or evidence of the crime whose disappearance there would be 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 attributions

respective, 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 have to report 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 has previously agreed in Opinions CNS 42/2014, CNS 47/2018 and CNS 15/2021, which can be consulted on the web www.apdcat.cat , it can be considered that article 16.3 of Law 41/2002 is sufficient to communicate data from the HC to the FFCCS when these, in the exercise of judicial police functions, accompany their request for a request from the judicial authority or the Public 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, and** must 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 health data of the person treated in the health center, which could be considered including the room number they occupy, are, as already explained, 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 this data, without the owner's consent, at the request of the Mossos d'Esquadra police, only when this acts as judicial police and within the framework of a specific investigation.

Regarding the possibility referred to in the query to condition the delivery to express commitment to communicate the matter to the Prosecutor's Office or to the court as soon as possible, it must be taken into account that the analyzed regulations attribute to the judicial police functions relating to "The investigation about the responsible parties and circumstances of the criminal acts and the detention of los primeros" and already foresees the need to report these actions to the judicial authority, "dando cuenta sequidademente a la autoridad judicial y fiscal, conforme a lo despuesto en las leyes" (article 549.1.a) LOPJ).

IV

In the event that, as the inquiry points out, the request of the Mossos d'Esquadra is not clear enough in terms of compliance with the requirements established in Article 22.3 LOPD, the health center could request clarification in this regard.

It should be borne in mind that the health center, as the person responsible for the treatment, is obliged to ensure the appropriate treatment of the information it manages. Thus, article 5.2 RGPD establishes that "The person responsible for the treatment will be responsible for complying with what is set out in section 1 and capable of demonstrating it **("proactive responsibility")."**

This will mean, in the case at hand, that the health center or hospital that is attending to the person whose data is requested, before making the communication, must be able to verify both the identification of the person or people who make the request as the fulfillment of the requirements to which the communication is subject, in accordance with article 22.3 LOPD.

For these purposes, it should be taken into account at the outset that, with regard to police officers, Law 10/1994, of July 11, on the police of the Generalitat Police, provides that they must always prove their professional identity (art. 9.1). Identification that can be done through the TIP number.

In addition, according to article 5.2 of the LOFFCCS in relation to the basic principles of action of FFCCS members:

"1 The following are basic principles of action for members of the Security Forces and Bodies: (...).

2. Relations with the community. Singularly:
(...).
b) (…). In all their interventions, they will provide complete information, and as wide as possible, about the causes and purpose of the same."

This requires, from the outset, a minimum justification by the police force regarding the need to access certain personal data, in this case for the specific investigation of a crime, in accordance with article 22 LOPD.

Conclusions

The Mossos d'Esquadra police can obtain a person's health data, including the number of the room in which they are admitted, without their consent only when they are acting as judicial police within the framework of a specific investigation.

In the event that the request of the Mossos d'Esquadra is not clear enough for the purposes of determining compliance with the requirements established in article 22.3 LOPD, the health center can request clarification.

Barcelona, March 26, 2021