

CNS 25/2021

Opinion in relation to the query made by a Foundation regarding the request to a care center for a patient's clinical history by the Public Prosecutor in the framework of an action related to civil order

A query from a Foundation is presented to the Catalan Data Protection Authority in which it is requested that the Authority issue an opinion in relation to the possibility of the Public Prosecutor's Office requesting from a care center the medical history of a patient in the framework of an action related to civil order.

In particular, the Foundation places the object of the consultation in the case where the Public Prosecutor, having become aware of the existence of a possible cause of incapacitation of a person, and with the purpose of assessing the origin to promote an incapacitation procedure, requests the patient's clinical history from a care center. In this context, he requests to know if "taking into account the characteristics and functions of the Public Prosecutor's Office in these procedures, access to clinical histories can be made directly to this body or must be made through the courts and tribunals ?".

The request is accompanied by a document in which the legal considerations underlying the proposed query are set out.

Having analyzed the request, which is not accompanied by more information, in view of the current applicable regulations and in accordance with the report of the Legal Counsel, the following is ruled.

I

(...)

II

The Foundation states based on the information sent that, following several questions that have been raised, and following the analysis of the role of the Public Prosecutor in relation to the current data protection regulations and the scope of its powers, doubts are raised in relation to the possibility of this requesting a care center to transfer a patient's clinical history, in order to assess the appropriateness of promoting a judicial procedure on his capacity , in those cases in which he has become aware of the existence of possible causes of incapacitation.

At the outset, it should be noted that to the extent that the case raised by the Public Prosecutor's Office intends to process personal data (in the sense of data relating to an identified or identifiable natural person), its action will be subject to data protection regulations.

The Fiscal Ministry, in accordance with the provisions of article 1 of Law 50/1981, of December 30, which regulates the Organic Statute of the Fiscal Ministry, "[...] tiene por misión promover la acción de justicia en defensa de la legalidad, de los derechos de los ciudadanos y del interés público protegido por la ley, ex officio o a solicitud de las partes interesadas, así como asegurar la independencia de los Tribunales, y procurar antes de ellos la satisfacción del interés social". With the aim of fulfilling this mission, article 3 includes the functions that correspond to it, among which it is interesting to highlight its action before the judicial bodies in the jurisdictional orders of the criminal, civil, contentious-administrative field and social

Article 2.2.d) of Regulation (EU) 2016/679 of the Parliament and of the Council, of April 27, 2016, relating to the protection of natural persons with regard to the processing of personal data and the free circulation of 'these data and by which Directive 95/46/EC (General Data Protection Regulation), henceforth RGPD, is repealed, provides that its provisions do not apply to the processing of personal data "por parte de las autoridades competentes para los fines de prevención, investigación, detección o prosecución de delitos, o la ejecución de sanciones penales, incluyendo protección contra amenazas a la seguridad pública y su prevención".

In the case we are dealing with, however, the query raised refers to the exercise of the powers of the Public Prosecutor in the field of the civil jurisdictional order - in relation to the processes on the capacity of people-. Therefore, the provisions of the RGPD will apply, as well as Organic Law 3/2018, of December 5, on the protection of personal data and guarantee of digital rights (from now on, LOPDGDD).

III

The RGPD provides that all processing of personal data must be lawful (article 5.1.a) and, in this sense, establishes a system of legitimization of data processing that is based on the need for one of the legal bases established in its article 6.1, which includes letter e), relating to the cases in which the treatment is necessary to fulfill a mission carried out in the public interest or in the exercise of public powers conferred on the person responsible for the treatment.

In addition, it should be borne in mind that in the case raised in the consultation, the Public Prosecutor's Office would be requesting the transfer of a patient's clinical history to a healthcare centre.

Law 21/2000, of December 29, on the rights of information concerning the patient's health and autonomy, and clinical documentation establishes that the clinical history "[...] collects the set of documents relating to the process healthcare for each patient while identifying the doctors and other healthcare professionals who have intervened" (art. 9.1), and this documentation must include information related to the clinical healthcare data, such as the description of the disease or problem of current health and successive reasons for consultation, or the clinical procedures used and their results, etc. (art. 10.1.b).

To the extent that article 4.15 of the RGPD considers that data relating to health refers to "[...] the physical health [...] of a natural person, including the provision of services

of health care, which reveal information about their health status", the Ministry's request Fiscal transfer of a clinical history will affect special categories of data, which remain subject to the regime provided for in article 9 of the RGPD:

"The processing of personal data that reveals ethnic or racial origin, political opinions, religious or philosophical convictions, or trade union affiliation is prohibited, and the processing of genetic data, biometric data aimed at uniquely identifying a natural person, data relating to health or data relating to the sexual life or sexual orientation of a physical person."

It should be noted, however, that this prohibition will not apply to the extent that any of the circumstances provided for in article 9.2 of the RGPD occur, of which, a priori, the one contained in section f) may seem applicable. Referring to the cases in which "the treatment is necessary for the formulation, exercise or defense of claims or when the courts act in the exercise of their judicial function".

Without prejudice to this, in short, the RGPD requires that any treatment is protected, at least, by one of the legal bases provided for in article 6.1 of the RGPD, of which in this opinion it is interesting to highlight the case of letter e), when the treatment is necessary for the fulfillment of a mission carried out in the public interest or in the exercise of the public powers conferred on the person responsible for the treatment, in this case the Public Prosecutor's Office. At the same time, to the extent that the processing that would be carried out by the Public Prosecutor's Office would affect special categories of data, it will also require that one of the circumstances provided for in article 9.2 of the RGPD is met, of which it is interesting to analyze whether it meets that provided for in letter f), when the treatment is necessary for the formulation, exercise or defense of claims.

With regard to the concurrence of the authorization provided for in letter e) of article 6.1 RGPD, in accordance with what is provided for in article 6.3 of the RGPD, the basis of the treatment provided for in this letter has been to establish by the law of the Union or of the Member States that applies to the data. This same article 6.3 adds that: "The purpose of the treatment must be determined in said legal basis or, in relation to the treatment referred to in section 1, letter e), it will be necessary for the fulfillment of a mission carried out in the public interest or in the exercise of public powers conferred on the controller." In relation to this, we refer to the provision of article 8.2 of the LOPDGDD, according to which the rule that enables the treatment must be a rule with the rank of law.

Our legal system regulates the functions of the Fiscal Ministry in Law 50/1981, of December 30, which, without prejudice to the attribution of other powers, provides that it corresponds to "Intervene in the civil proceedings that determine the law when the social interest is compromised or when they may affect minors, incapable or disabled persons as long as the ordinary mechanisms of representation are provided." (article 3.7).

At the same time, article 757 of Law 1/2000, of January 7, on Civil Procedure (henceforth, LEC) provides that the Public Prosecutor must promote the incapacitation of a person in certain cases:

"1. The declaration of incapacity can be promoted by the presumed incapacitated person, the spouse or whoever is in a similar de facto situation, the descendants, the ascendants, or the siblings of the presumed incapacitated person.

2. The Public Prosecutor must promote the incapacitation if the persons mentioned in the previous section do not exist or have not requested it.

3. Any person has the right to inform the Public Prosecutor of the facts that may determine the incapacitation. Authorities and public officials who, by reason of their positions, become aware of the existence of a possible cause of incapacitation in a person, must notify the Public Prosecutor's Office. [...]"

On the other hand, article 6.1.6 of the LEC establishes that the Public Prosecutor's Office may be a party in the processes before the civil courts in which, in accordance with the law, it must intervene as a party. This is the case of processes on the capacity of people, in accordance with what is provided for in article 749 of the LEC, in which the Public Prosecutor must intervene even if it has not been the promoter nor must assume, in accordance with the law, the de

Based on the wording of article 757.2 of the LEC, in relation to the duty of the Public Prosecutor to promote the incapacitation due to the existence, or inaction, of the persons provided for in the first section, and also of the provisions of article 749, it can be deduced that the Public Prosecutor must be able to know the existence of possible causes of incapacitation in a p

For this purpose, it is relevant to bring to the analysis the provision of article 5, in fine, of Law 50/1981 by which "Also for the Prosecutor to initiate pre-trial proceedings aimed at facilitating the exercise of the other functions that the ordenamiento juridical attributes it". A priori, based on this, it would seem that the request of the Public Prosecutor's Office, addressed to a care center, to transfer the clinical history of a patient about whom it has become aware of the existence of possible causes of incapacitation, with the objective of assessing the origin of promoting the incapacitation process, could correspond to the so-called pre-trial proceedings, insofar as it would seem a priori that they would be initiated with the purpose of facilitating the exercise of the functions that the regulations assigns him, as now, in the case at hand, to assess whether it is appropriate to promote the procedure on the capacity.

In relation to this provision, Circular 4/2013, relating to investigation proceedings, of the State Attorney General's Office, states in point "XX.- Pre-trial proceedings in non-criminal areas" the following:

"The reform introduced by Law 14/2003 in the Organic Statute of the Ministerio Fiscal, introduced in art. 5 a rule of coverage for a plurality of actions that must be carried out by the Public Prosecutor's Office in scattered areas and for those that did not have any formal support. Indeed, the art. 5 EOMF in fine provides that the Prosecutor may also initiate pre-trial proceedings aimed at facilitating the exercise of the other functions attributed to him by the legal system.

This provision allows the Prosecutor to have a procedural vehicle to carry out when he considers it convenient a preliminary examination of a matter belonging to any jurisdiction before arriving at "promoting the action of justice".

[...]

This same scheme can be transferred to multiple tasks of the Prosecutor's Office, especially in the matter of preparing civil lawsuits for which the Prosecutor is legitimized as incapacitations, [...]"

Taking into account what has been analyzed, it would seem that the request of the Public Prosecutor's Office to transfer a medical record of a patient about whom it has become aware of the existence of a possible cause of incapacitation, with the purpose to assess the propriety of promoting an incapacitation procedure on that one, it would be able to be a treatment necessary for the exercise of public powers (Article 6.1.e of the RGPD) conferred, on the one hand, by the Law 50/1981 as well as, on the other hand, the LEC, in the terms set forth. In addition, given the context of the request, it is clear that the treatment of data relating to the health of the patient, owner of the medical history, is also necessary in the terms provided for in article 9.2.f) of the 'RGPD (for the formulation, exercise or defense of claims or when the courts act in the exercise of their judicial function).

However, the fact that there is a legal basis that enables the treatment does not exclude the necessary compliance with the rest of the principles or obligations of the data protection regulations.

IV

The principle of data minimization (art. 5.1.c) RGPD) requires that any data processing that is carried out, such as the communication or access to personal data, is limited to the minimum data necessary to achieve the intended purpose with the treatment.

Starting from the assumption raised in the consultation, in which the Public Prosecutor's Office would be requesting the clinical history of a patient from a care center, in order to assess the origin of promoting an incapacitation procedure, it is necessary to analyze in to what extent the processing of this data is strictly necessary to achieve said purpose.

Access by the Public Prosecutor's Office, in the terms described in the consultation, to the information in the medical history would only be justified to the extent that the information contained in it could be relevant to assess their capacity. But it cannot be ruled out that the medical history also contains other information that is not relevant for these purposes.

In fact, the consultation does not specify the type of care center to which the Public Prosecutor's Office would request the medical history. But this information can be a relevant first element when determining whether the treatment is proportionate.

In the event that it is a center dedicated to providing assistance in matters of mental health, predictably all the information contained therein may be relevant in a process of this nature. In the case of other types of centers, it will be necessary to limit the communication to those aspects that are relevant to be able to determine the existence of a cause of incapacitation.

For this reason, especially when the request is addressed to care centers that also provide assistance in areas other than mental health, from the point of view of the minimization principle, it would be appropriate to specify in the request the type of information requested . This practice would make it easier for each care center to be able to assess, before transmitting the clinical history, the information relevant to the intended purpose.

In conclusion, in application of the principle of data minimization, the request of the Public Prosecutor's Office for the transfer of a medical history should only cover the relevant information in relation to the possible causes of incapacitation of which it has become aware, with the purpose of assessing whether it is appropriate to promote an incapacitation procedure.

Conclusions

From the point of view of data protection regulations, the Public Prosecutor's Office has sufficient authorization to request from a care center information on the clinical history of a certain patient that may be relevant when promoting a court proceeding about a person's capacity.

Barcelona, May 7, 2021