

CNS 37/2021

**Opinion in relation to the query made by an entity on the transfer of data of professionals vaccinated against COVID19**

A query is presented to the Catalan Data Protection Authority by the data protection delegate of an entity regarding the transfer of data by the Occupational Risk Prevention Service of another entity, of vaccinated professionals of the first against the COVID19.

In the consultation, it is stated that the entity is a monographic hospital center integrated in the SISCAT and that, at the level of care, it forms a third-level general hospital complex with a second entity, both entities being legally independent.

That for reasons of efficiency, collaboration and proximity, the vaccination against COVID19 of the professionals of the first entity is carried out by the Occupational Risk Prevention Service of the second and, therefore, the latter has the information on the vaccinated professionals.

That the second entity advises them that, in order to transfer the updated lists of vaccinated professionals to them, the agreement of the Health and Safety Committee of the first entity is required.

In this context, the DPD asks the Authority if, from the point of view of the protection of personal data of its professionals, "there would be any inconvenience if our Health and Safety Committee expressed its agreement to the delivery of information ( ...)".

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

As stated in the consultation, the vaccination against COVID19 of the consulting entity's professionals is carried out, for reasons of efficiency, collaboration and proximity, by the Occupational Risk Prevention Service of a second entity. Given that they are two legally independent institutions, the DPD of the first raises whether, from the point of view of data protection regulations, the communication of the status of the vaccination of these professionals by the SPRL of the second entity (hereinafter SPRL2) to the Occupational Risk Prevention Service of the consulting entity (hereinafter SPRL1) requires the agreement of SPRL1

In order to answer the question raised, it must first be taken into account that in accordance with the provisions of articles 2.1 and 4.1 of Regulation (EU) 2016/679 of the Parliament and of the

Council, of 27 April 2016, relating to the protection of natural persons with regard to the processing of personal data and the free movement of such data and which repeals Directive 95/46/CE (hereafter RGPD ), the data protection regulations apply to the treatments that are carried out on any information "about an identified or identifiable natural person ("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".

The data on whether a person has been vaccinated are data relating to health in accordance with the definition contained in article 4.15 of the RGPD and therefore subject to the principles and guarantees of the RGPD data protection regulations and Organic Law 3/2018, of December 5, Protection of personal data and guarantee of digital rights (LOPDGDD).

The RGPD establishes that personal data must be treated lawfully, loyally and transparently in relation to the interested party (principle of lawfulness (article 5.1.a) RGPD).

According to article 6.1 of the RGPD, the treatment is lawful if it meets at least one of the following conditions:

- "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;
- f) the treatment is necessary for the satisfaction of legitimate interests pursued by the person responsible for the treatment or by a third party, provided that these interests do not prevail over the interests or fundamental rights and freedoms of the interested party that require the protection of personal data, in particular when the interested party is a child"

Article 6.3 of the RGPD establishes that the legal basis for the treatment indicated in sections c) and e) must be established by European Union Law or by the law of the Member States that applies to the person responsible for the treatment.

The reference to the legitimate basis established in accordance with the internal law of the Member States referred to in this article requires that the rule of development, when dealing with the protection of personal data of a fundamental right, has the status of law (Article 53 EC ), as it has come to

recognize article 8 of Organic Law 3/2018, of December 5, on the protection of personal data and guarantee of digital rights (hereinafter, LOPDGDD).

In addition, it must be borne in mind that, when the treatment affects special categories of data, as is the case with data relating to health, it is also necessary to count on one of the exceptions established in article 9.2 of the RGPD in order to be able to consider this data processing lawful.

Thus, article 9 of the RGPD provides that:

"1. The processing of personal data that reveal 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 the health or data relating to the sexual life or sexual orientation of a natural person.

2. Section 1 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, except when the Law of the Union or of the Member States establishes that the prohibition mentioned in section 1 cannot be lifted by 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 assistance or treatment of a sanitary or social type, or management of assistance systems and services health and social, 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; (...)"

At the same time, the seventeenth additional provision of the LOPDGDD states that:

"1. The treatments of health-related data and genetic data that are regulated in the following laws and their provisions are covered by letters g), h), i) and j) of article 9.2 of Regulation (EU) 2016/679 development:

(...)

a) Law 14/1986, of April 25, general health. b) Law 31/1995, of November 8, on the Prevention of Occupational Risks. c) Law 41/2002, of November 14, basic regulation of patient autonomy and rights and obligations in the field of clinical information and documentation. (...) g) Law 33/2011, of October 4, general public health."

It is appropriate to analyze, first of all, whether there is a legal basis, from those established in the LOPDGDD, which enables this treatment by the Occupational Risk Prevention Services.

### III

In the labor field, the aspects related to the health of workers are regulated in our legal system fundamentally, in addition to Law 31/1995, of November 8, on the prevention of occupational risks (LPRL), in Law 33/ 2011, of 4 October, General of Public Health (LGSP), and in Catalonia, in Law 18/2009, of 22 October of public health (LSP) (articles 48 and 49).

Article 33 of the LGSP regarding health action in the field of occupational health, establishes:

**"1. Health action in the field of occupational health will be developed in a coordinated manner with employers and workers' representatives and will include the following aspects:**

- a) Promotion, with a general character, of the integral health of workers.**
- b) Monitoring the health of workers, individually and collectively, to detect early the effects of the health risks to which they are exposed.**
- c) Development and action in the health aspects of occupational risk prevention.**
- d) Promotion of information, training, consultation and participation of health professionals, workers and their legal representatives and employers in health plans, programs and actions in the field of occupational health.**

**2. The health authority, in coordination with the labor authority, will carry out the following actions in addition to those already established by law: a) Develop a health information system in occupational health that, integrated into the public health information system, support the monitoring of work-related health risks.**

**b) Establish a system of indicators to monitor the impact on health of work-related policies.**

**c) Promote health surveillance of workers, through the development of specific health surveillance protocols and guides in attention to the risks to which they are exposed.**

**d) Develop post-occupational health surveillance programs.**

**e) Authorize, evaluate, control and advise the health activity of the occupational risk prevention services.**

**f) Establish mechanisms for the integration in the public information systems of the National Health System of the information generated by the health activities developed by the occupational risk prevention services and by the social security mutuels for work accidents and occupational diseases in relation to the health of workers.**

- g) Foster the promotion of health in the workplace, through the promotion and development of healthy living environments and habits.**
- h) Establish coordination mechanisms in case of pandemics or other health crises, especially for the development of preventive and vaccination actions.**
- i) Any others that promote the improvement in surveillance, promotion and protection of workers' health and the prevention of work-related health problems.**
- j) Promote occupational health training for health professionals in public health systems.**

Regarding occupational risk legislation, Law 31/1995, of November 8, on the prevention of occupational risks (LPRL) establishes that "workers have the right to effective protection in matters of safety and health at work" , recognition that, in turn, entails "the existence of a correlative duty of the employer to protect workers against labor risks" (article 14.1).

In compliance with this duty of protection, the LPRL provides that "the employer must guarantee the safety and health of the workers in his service in all aspects related to work. To this effect, within the framework of his responsibilities, the employer will carry out the prevention of occupational risks by means of the integration of preventive activity in the company and the adoption of whatever measures are necessary to protect the safety and health of the workers , with the specialties that are included in the following articles in the field of occupational risk prevention plan, risk assessment, information, consultation and participation and training of workers, action in cases of emergency and serious and imminent risk, monitoring of health, and through the establishment of an organization and the necessary means in the terms established in chapter IV of this law" (article 14.2).

It corresponds to the prevention services, in accordance with article 31 of the LPRL to carry out "preventive activities in order to guarantee the adequate protection of the security and health of the workers, advising and assisting the employer, to the workers and their representatives and the specialized representative bodies" (section 2).

In this sense, the third section of this article 31 establishes that the prevention services must be in a position to provide the company with the advice and support it requires based on the types of risk that exist, in relation with:

- "a) The design, implementation and application of an occupational risk prevention plan that allows the integration of prevention in the company.**
- b) The evaluation of risk factors that may affect the safety and health of workers in the terms provided for in article 16 of this Law.**
- c) The planning of preventive activity and the determination of priorities in the adoption of preventive measures and the monitoring of their effectiveness.**
- d) The information and training of workers, in the terms provided for in articles 18 and 19 of this Law.**
- e) The provision of first aid and emergency plans.**

**f) Monitoring the health of workers in relation to risks arising from work.”**

These precepts enable the company through the prevention service to monitor and evaluate risk factors and to adopt the appropriate measures depending on the risks inherent in the different workplaces.

In addition, in accordance with what is established in article 10 of the LPRL, and article 21 of the LGS, the prevention service must collaborate with the primary health care services and specialized health care for the diagnosis, treatment and rehabilitation of work-related illnesses, and with the health administrations competent in the occupational health activity that is planned.

Regarding these actions in the current context of the pandemic, the health authorities have approved, at the level of Catalonia, the "Guide for action and collaboration of occupational risk prevention services to deal with the COVID-19 pandemic" which has been approved by the Ministry of Health. This document "Procedimiento de actuación para los servicios de prevención de riesgos laborales frente a la exposición al Sars-cov-2", dated July 16, 2021, which contains specific forecasts regarding personnel who provides services in health and socio-health centers and which includes the collaboration of the work centers with the health authorities in risk management and the control of the spread of the pandemic, as well as the reinstatement of vaccinated workers.

It must be taken into account that in the case of staff who provide services in health or socio-health centers, both Royal Decree-Law 28/2020, of September 22, on remote work (fourth additional provision) and Royal Decree- Law 3/2021, of February 2, by which measures are adopted to reduce the gender gap and other measures in the areas of Social and Economic Security (Article 6), have provided that in the case of diseases suffered by these personnel as a result of the contagion of the SARS-CoV2 virus, the determining contingency of these incapacity processes is considered a work accident and, in the cases provided for, they will have the same benefits as the Social Security system awarded to people affected by an occupational disease.

Applied to the case at hand, this entails recognizing that the company can adopt the measures it considers appropriate to protect and preserve the health of its workers in the face of the current health emergency situation due to Covid19, including the promotion of vaccination of the his staff.

In the health field (doctors, nurses and laboratory technicians) Royal Decree 664/1997, on the protection of workers against risks related to exposure to biological agents, which according to its article 1 is issued in the framework of the LPRL, establishes in its article 8.3 that "when there is a risk of exposure to biological agents for those who have effective vaccines, these must be made available to workers, informing them of the advantages and disadvantages of vaccination .". In these cases the company has the duty to offer the treatment, in this case the vaccination, although the worker is the one who decides whether to undergo the treatment or not.

In this context, the information on vaccinated workers, whether the vaccination is carried out by the same occupational risk prevention services, or by the mechanisms of

vaccination established by the health authorities, is necessary information for the Occupational Risk Prevention Services of the companies for the development of the functions that are legally entrusted to them. Thus, it could be concluded that there is a legitimate basis in the provisions analyzed for the treatment of these workers' health data to the extent that they are necessary for the fulfillment of the employer's obligations in the matter of safety and health at work in relation to articles 6.1.c) and 9.2.h) of the RGPD.

In the case at hand, therefore, the processing of information about the organization's vaccinated healthcare professionals by its Occupational Risk Prevention Service would have a legitimate basis in the provisions mentioned in the field of health and safety and health in the work in relation to 6.1.c) and 9.2.h) of the RGPD.

#### IV

Having determined the legality of the treatment, the consultation considers whether the SPRL1 needs an agreement to accept the transmission of this information by the SPRL2.

It must be taken into consideration that the person responsible for the treatment, in accordance with article 4.7 of the RGPD, is "the natural or legal person, public authority, Service or other organism that, alone or together with others, determines the ends and means of treatment (...)", while the person in charge of the treatment, in accordance with article 4.8 RGPD is "the natural or legal person, public authority, Service or other organism that treats personal data on behalf of the person responsible".

As this Authority has highlighted, in the "[Guide on the person in charge of the treatment in the RGPD](#)" to facilitate the distinction between the person in charge and the person in charge, we must take into account that it is up to the person in charge to decide on the purposes and the uses of the information while the person in charge of the treatment must comply with the instructions of those who entrust him with a certain service, in relation to the personal data to which he has access as a result of the provision of this service.

In the case we are dealing with, the vaccination of the organization's professionals was carried out by an external prevention service (SPRL2) which seems to act on behalf of SPRL1. This may entail, at the outset, that the entity provides SPRL2 with, among other information, the list of personnel susceptible to vaccination.

From the point of view of the data protection regulations and to the extent that the SPRL2 acts on behalf of the entity, this would be the person responsible for the processing of the data of its personnel, while the second entity, through the his Prevention Service would act as the person in charge of processing the data of the professionals of the first who access the vaccination.

And within the framework of this assignment, it would not pose any problems, from the point of view of the right to data protection, for the Prevention Service that carries out the vaccination to communicate the result to the Prevention Service of the first entity, identifying the staff to whom the vaccine has

In any case, in accordance with article 28 of the RGPD, the processing by the person in charge must be governed by a contract, agreement or legal act that binds the person in charge with respect to the person in charge of the treatment and establish the object, duration, nature and purpose of

treatment, the type of personal data and the categories of interested parties, and the obligations and rights of the person in charge referred to in article 28.3.

The formalization of the assignment of the processing of personal data between both institutions is necessary, therefore, so that SPRL2 can access the data of the professionals of the first entity who are susceptible to vaccination and, for the successive treatments of this data , including keeping the SPRL1 informed about the vaccination status of these professionals.

### Conclusions

From the point of view of data protection regulations, if the SPRLSP carries out the vaccination of the professional staff of the Foundation on its behalf, the processing of the personal data of the professionals, including the vaccination status, requires the formalization of an assignment of the treatment between both institutions in terms of article 28.3 of the RGPD.

Barcelona, August 2, 2021