

Opinion in relation to the query made by a foundation on the treatment of data relating to the Covid19 vaccination status of center users for the organization of group therapeutic activities

A letter from the Data Protection Delegate of an entity that is part of the Comprehensive Health System for Public Use of Catalonia (SISCAT) is presented to the Catalan Data Protection Authority, in which the Authority is requested to issue an opinion on the possibility of processing data on the Covid19 vaccination status of its users in order to organize group therapeutic activities. Specifically, it is proposed to form the groups distinguishing between vaccinated users and non-vaccinated users or users who do not have the complete vaccination schedule.

Analyzed the query, given the current applicable regulations, and in accordance with the report of the Advisory Board I issue the following legal opinion

I

(...)

II

The organization of group therapeutic activities depending on the Covid19 vaccination status of the users of the center referred to in the consultation entails the processing of personal data, specifically, data relating to health (article 4.15) of Regulation (EU) 2016/679, of the Parliament and of the European Council, of April 27, 2016, General Data Protection Regulation (RGPD), which remains subject to personal data protection legislation.

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).

Article 6.1 of the RGPD regulates the legal bases on which the processing of personal data can be based, either the consent of the affected person (letter a), or any of the other bases provided for in the same precept, such as when the treatment "is necessary for the fulfillment of a legal obligation applicable to the person responsible for the treatment" (letter c).

As can be seen from Article 6.3 of the RGPD, the legal basis for the treatment indicated in Article 6.1.c) must be established by the Law of the European Union or by the law of the Member States that applies to the responsible for the treatment. The referral to the legitimate basis established in accordance with the internal law of the member states requires, in the case of the Spanish State, in accordance with article 53 of the Spanish Constitution, that the rule of development, to be about a fundamental right, has the status of law.

In this sense, article 8 of Organic Law 3/2018, of December 5, on Protection of Personal Data and guarantee of digital rights (hereinafter LOPDGDD) establishes the legal scope of the enabling rule.

In addition, when the treatment affects special categories of data, as is the case of data relating to health (Article 4.15) RGPD), it is also necessary to count on one of the exceptions established in Article 9.2 of the RGPD, for in order to be able to consider this data processing lawful.

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 applies: a) the interested party gives his explicit consent to the treatment of said personal data with one or more of the purposes specified, except when the Law of the Union or The member states establish that the prohibition mentioned in section 1 cannot be lifted by the interested party. (...) i) the treatment is necessary for reasons of public interest in the field of public health, such as protection against serious cross-border threats to health, or to guarantee high levels of quality and security of health care and medicines or health products, on the basis of the Law of the Union or of the Member States that establishes adequate and specific measures to protect the rights and freedoms of the interested party, in particular professional secrecy. (...)."

In accordance with Organic Law 3/1986, of April 14, on special measures in the field of public health, "the health authorities of the different Public Administrations may, within the scope of their powers, adopt the measures provided for in the this Law when so required by health reasons of urgency or necessity" (article 1).

Specifically, the competent authorities in matters of public health can "adopt measures of recognition, treatment, hospitalization or control when they appreciate rational indications that allow us to assume the existence of danger to the health of the population due to the specific health situation of a person or group of people or because of the health conditions in which an activity is carried out" (article 2) and, in order to control communicable diseases, they can "adopt the appropriate measures for the control of the sick, of the people who are or have been in contact with the same and the immediate environment, as well as those considered necessary in the case of risk of a transmissible nature" (article 3).

These forecasts are set out in similar terms to Law 18/2009, of October 22, on public health (LSP), which aims to organize actions, benefits and services in the field of public health in the territorial area of Catalonia established by Law 15/1990, of July 9, on health regulations in Catalonia, to guarantee the monitoring of public health, the promotion of individual and collective health, the prevention of illness and health protection (article 1).

Specifically, article 55 of the LSP, in the wording given by Decree-law 27/2020, of July 13, amending Law 18/2009, of October 22, on public health, and adoption of urgent measures to deal with the risk of outbreaks of COVID-19, provides that:

"1. The health authority, through the competent bodies, can intervene in public and private activities to protect the health of the population and prevent disease. To this end, it can: (...) j) Adopt measures of medical examination, treatment, hospitalization or control if there are rational indications of the existence of danger to people's health due to a specific circumstance of 'a person or a group of people or by the conditions in which an activity is carried out. Measures can also be adopted for the control of people who are or have been in contact with the sick or the carriers. These measures must be adopted within the framework of Organic Law 3/1986, of April 14, on special measures in the field of public health, and State Law 29/1998, of July 13, regulating administrative contentious jurisdiction, and the legal provisions that modify or repeal them. k) In pandemic or epidemic situations declared by the competent authorities, the competent health authorities may adopt measures to limit activity, the movement of people and the provision of services in certain territorial areas provided for in annex 3, d in accordance with the provisions of article 55 bis.

2. The measures referred to in paragraph 1 must be adopted respecting the rights that the Constitution recognizes for citizens, especially the right to personal privacy, in accordance with what is established in the data protection regulations of personal nature and with the procedures that these regulations and the other applicable regulations have established, and having the mandatory authorizations."

And article 55 bis of the LSP, added by Decree Law 27/2020, cited, provides that:

"1. The adoption of the measures referred to in letter k) of the previous article aims to guarantee the control of contagions and protect people's health, in accordance with the principle of proportionality.

For these purposes, the adoption of the indicated measures will require the issuance of a report issued by the director of the Public Health Agency, in the healthcare aspects proposed by the Catalan Health Service and in the epidemiological aspects and of public health, at the proposal of the Agency itself, which will aim to certify the current situation of risk of contagion, the control situation of the pandemic, the sufficiency of the measures, and will propose the measures to be adopted.

The reports will conform to the parameters established in the annexes of Decree Law 27/2020, of July 13, amending Law 18/2009, of October 22, on Public Health and adopting urgent measures to facing the risk of outbreaks of COVID-19.

2. Whenever possible, the resolution will formulate recommendations to be followed to avoid risks of contagion. In the event that mandatory measures are established, this obligation must be expressly stated, which will be based on the reports issued.

The resolution will expressly indicate the existence or not of the maintenance of essential services, among those indicated in Annex 2.

3. The resolution that establishes the measures will indicate their duration, which in principle must not exceed 15 days, unless the necessary establishment of a longer period is justified, without prejudice to the fact that an extension can be requested, justifying the maintenance of the conditions that justified its adoption. In any case, periodic reports on the effects of the measures will be issued, as well as a final report, once these have been exhausted.

4. The establishment of the aforementioned measures must be carried out always taking into account the least impact on people's rights, and whenever possible, they must be territorially adjusted to the minimum area necessary for their effectiveness

5. The resolution by which the specific measures are adopted may establish mechanisms for grading the measures based on the evolution of the indicators."

Annex 3 of this Decree Law 27/2020 defines the measures to be adopted within the framework of the COVID-19, which, in terms of health, socio-sanitary and social services, the context in which we find ourselves, may include:

"Health, Sociosanitary and Social Services:

**Coordination on the strategy, guidelines and escalation plans for the type of health care in primary care, hospital and social services (defining a minimum of face-to-face care and delocalising the rest of the resources)
Restrictions on visits to residential facilities"**

It is also foreseen that the set of measures defined in this Annex "may be subject to updating through a Resolution of the Steering Committee of the Plan for Emergencies Associated with Emerging Communicable Diseases with Potential Risk, PROCICAT, and may be applicable to any other pandemic or epidemic declared within the framework of Law 18/2009, of October 22."

For its part, Law 33/2011, of October 4, general public health (LGSP) establishes that "without prejudice to the measures provided for in Organic Law 3/1986, of April 14, on Special Measures in Matters of Public Health, with an exceptional character and when so required by reasons of extraordinary gravity or urgency, the General Administration of the State and those of the autonomous communities and cities of Ceuta and Melilla, within the scope of their respective competences, may adopt any number of measures necessary to ensure compliance with the law" (article 54.1).

In accordance with these precepts, from the point of view of the processing of personal data, it is the responsibility of the competent public health authorities of the various public administrations to safeguard the essential interests in the field of public health and, to that end, the adoption of the necessary measures provided for in these laws to, in the face of a public health emergency (such as the one currently arising from Covid19), protect the health of the population and prevent its contagion.

That being the case, the different data processors (both public and private) will have to follow these measures, and this will also entail, where appropriate, the authorization to carry out the necessary data treatments, even when this involves a treatment of data relating to the health of natural persons.

Therefore, in the event that the competent authority in matters of public health establishes the obligation to adopt a measure such as that mentioned in the consultation (formation of stable groups of people using the service depending on their status vaccine for Covid19), the entity would remain legitimate to carry out the treatment of health data resulting from its implementation, on the basis of articles 6.1.c) and 9.2.i) of the RGPD, given that this would be necessary for the fulfillment of an obligation imposed by the health authority in accordance with public health legislation.

III

Until the date of issuance of this opinion, this Authority is not aware that the competent authorities in matters of public health have established, neither generally nor specifically in the field of mental health care, the mandatory adopt the measure consisting of organizing the stable groups of people who use a certain service based on their vaccination status regarding Covid19.

It is also not known that they have established the obligation to check this circumstance (whether or not to have the full schedule of the Covid19 vaccine) as a condition to be able to access a certain public or private establishment, activity or service.

In the area of Catalonia, the successive resolutions that have been adopted under the protection of the applicable health and public health legislation contemplate various measures in the field of public health to deal with the health emergency situation caused by the COVID -19. These measures aim to promote distancing between people who do not belong to stable coexistence groups, limit social interactions, dispense with those non-essential activities that pose a risk of contagion and avoid agglomerations or concentrations of people in concurrency spaces public, especially in closed places.

With regard specifically to the possibility of carrying out group activities, in different areas of activity, these resolutions do not specifically include the adoption of a measure such as the one proposed, consisting of forming groups in which people participants whether or not they have the complete Covid19 vaccination schedule.

This can be seen, for example, in the latest Resolution SLT/2498/2021, of July 29, which extends and modifies the public health measures to contain the epidemic outbreak of the COVID-19 pandemic in the territory of Catalonia.

In general, the development of group activities is allowed subject to certain conditions such as the accreditation of the reinforced ventilation and air quality conditions indicated by the same health authority, respect for certain capacity limits and the adoption of other individual and collective protection measures such as, among others, physical interpersonal safety distance and the use of a mask, always in accordance with the indications of the sectoral plans approved by the Management Committee of the Plan d 'performance of the PROCICAT.

In accordance with Resolution SLT/1429/2020, of June 18, by which basic protection and organizational measures are adopted to prevent the risk of transmission and favor the containment of SARS-CoV-2 infection (the which remains in force insofar as it is not opposed to the successive resolutions adopted), "the persons holding the different activities are responsible for adapting the conditions of their exercise to the measures and forecasts contained in the sectoral plan corresponding" (section 1.2.4).

The sectoral plans adopted so far can be consulted on the website of the Department of the Interior (https://interior.gencat.cat/ca/arees_dactuacio/proteccio_civil/cosells_autoproteccio_emergent/ia/emergent-communicable-diseases-with-high-risk-potential/sectoral-plans/) and, as indicated in section 1.2.1 of Resolution SLT/1429/2020, the measures that contemplated must complete the measures provided for in the same and subsequent resolutions.

The services provided by the consulting entity, according to the information available, are aimed at people with serious mental health difficulties.

The Steering Committee of the PROCICAT Action Plan has adopted different sectoral plans aimed at owners of centers that provide specialized care services to vulnerable groups, such as people with mental health disorders.

In this sense, it is necessary to mention, as an example, the Social Services Sectoral Plan of the Directorate of Social Services (DGSS) in the resumption stage, the objective of which is to propose a set of measures and recommendations for to the services that depend on the DGSS so that they can recover the functions entrusted to them in the Social Services Po

In this Sectoral Plan (latest version of July 29, 2020), the following is established, with regard to group and collective activities:

"The persons in charge of the activity or, where appropriate, the persons responsible for its organization, must adopt the organizational measures that are necessary to guarantee the maintenance of individual protection measures. In particular, make available:

o Systems for cleaning hands. o Interpersonal physical safety distance. o Guarantee the conditions of cleaning, disinfection and ventilation of spaces, establishments and facilities. o Maintain stable groups. o Have a record of the people who are part of it.

When this is difficult or not possible due to the specific conditions of the activity, it must be guaranteed, for the workers and the users, the appropriate prevention and hygiene measures to prevent the risks of contagion.

It is recommended to convert face-to-face activities and group training sessions by avoiding the concentration of people in common spaces by reducing their flow to guarantee the safety separation distance between people.

And that the group activities are carried out in groups of a maximum of 10 people, which are as stable as possible in terms of their members, and with the same professionals of reference, in order to maximize protection, and if necessary, facilitate the sanitary and epidemiological action in the event of the appearance of symptoms in any user or professional. (...)."

It can be seen that there is no provision on the organization of group activities for users based on their Covid19 vaccination status. Nor on the possibility that the aforementioned organizational forecasts could be modified in the face of an eventual vaccination of the users.

Nor does this measure appear in other temporally more recent sectoral plans - nor in documents associated with these plans - applicable to the owners of centers that provide services to people with disabilities, among whom could be found the users of the 'consulting entity, such as in the documents Measures and recommendations in the resumption phase due to the COVID-19 of leisure for people with disabilities (March 2021 version) or Measures and recommendations for the handling of the COVID-19 of day care centers and social services for people with disabilities (June 2021 version).

Thus, for example, in this last document it is established that:

"The day care centers and social services for people with disabilities in the resumption phase will resume face-to-face group activity taking into account the following criteria:

- Guarantee a distance of 1.5 meters and a space of 2.5m²/person in any of the activities and group services that are carried out inside the center; as well as sufficient ventilation capacity in each of the spaces enabled for group activities.

Both in closed spaces and outdoors, interpersonal physical safety distance is generally set at 1.5m. The safety surface can be reduced to 1 m² per person, as long as the mask is mandatory and the space is well ventilated.

The users are not obliged to use masks if, due to their disability or dependency, they do not have the autonomy to remove the mask or have behavioral changes that make their use unfeasible.

- Organize the group activities of these centers and services to be carried out in "stable groups" of people served and professionals.

Therefore, and in view of the need to maintain physical distancing and distance in group activities, common spaces and the dining room, if applicable, attention may be temporarily adopted by time slots and/or alternating days of the week. For example, 2 shifts can be established within the general care hours from 8am to 5pm, from 8am to 1pm and from 1pm to 5pm, with 2 lunch shifts, or other organizational measures for the groups that the centers consider, which respond to the needs of families and guarantee the aforementioned distance and ventilation measures. Among these measures it would also be possible to look for alternative spaces in the center itself or other alternative locations. The use of these will require a process of cleaning, disinfection and ventilation of the spaces, after the use of a coexistence group and before use by another group."

Although in the latter case the possibility of being able to temporarily adopt "other organizational measures of the groups that the centers consider", these measures must in any case be aimed at guaranteeing "the mentioned distance and ventilation measures", as can be seen from the precept transcribed.

For all that, it must be concluded that until the competent authority in matters of public health does not establish any decision that requires processing the information on the vaccination status of Covid19 of the people who use the center for the purposes of organizing group therapeutic activities in the sense proposed in the present consultation, the processing of these data could not be carried out in accordance with the aforementioned precepts.

On the other hand, it is also necessary to rule out that the treatment can be carried out based on the consent, even if it was explicit, of the people affected. It should be remembered that in accordance with article 4.11 of the RGPD to consider that there is a valid consent, we must be faced with any manifestation of free, specific, informed and unequivocal will by which the interested party accepts, through a statement or a clear affirmative action, the processing of personal data affecting you.

And as Recital 43 of the RGPD recalls, consent cannot be considered to be free when there is a clear position of imbalance between the parties:

"To guarantee that the consent has been given freely, this must not constitute a valid legal basis for the treatment of personal data in a concrete case in which there is a clear imbalance between the interested party and the person responsible for the treatment, in particular when said person in charge is a public authority and it is therefore unlikely that consent was given freely in all the circumstances of said particular situation."

In the case we are dealing with, even though the Foundation raising the query is not a public authority, it is an entity that provides a public service within the framework of SISCAT, so it does not seem that the people involved they are given the ability to decide freely. Therefore, the consent of the affected persons must also be ruled out.

In accordance with the considerations made so far in relation to the query raised, the following are made,

Conclusions

In order to be able to base the processing of data relating to the Covid19 vaccination status of center users for the organization of group therapeutic activities in articles 6.1.c) and 9.2.i) RGPD, it would be necessary for the competent authorities in matters of public health establish the obligation to organize group activities based on the Covid19 vaccination status of the participants, which is not recorded at the date of issue of this opinion.

Barcelona, August 6, 2021

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