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Legal report issued at the request of the Commission for the Guarantee of the Right of Access to Information Public in relation to the claim against the partial estimate by the Catalan Health Service of a request for access to the number of health professionals who have exercised conscientious objection to the voluntary termination of pregnancy

The Commission for the Guarantee of the Right of Access to Public Information (GAIP) asks the Catalan Data Protection Authority (APDCAT) to issue a report on the claim, presented in relation to the partial estimate by the Catalan Service of the Health of a request for access to information regarding the number of health professionals who have exercised conscientious objection in the matter of voluntary termination of pregnancy.

Having analyzed the request, which is accompanied by a copy of the file of the claim submitted, in accordance with the report of the Legal Counsel, the following is reported:

Background

1. On November 29, 2020, a request was submitted to the Catalan Health Service (hereinafter, SCS) in which it is requested, on the one hand, *"the list of health professionals who have expressed objection to awareness to the interruption of pregnancy, distributed by basic areas of health and that have been in practice during the years 2015-2020. For each year and basic area, the number of healthcare workers who have expressed their objection and their category (doctor, nursing staff...) is requested.*

On the other hand, it is also requested *"[...] for each basic area of health and year, [...] the number of health personnel directly involved in the voluntary interruption of pregnancy. The final objective is to know what number of health personnel involved in pregnancy interruption processes have expressed conscientious objection in each basic area of health, and what percentage it represents in relation to the total".*

The applicant states that the reason for the request is *the "production of journalistic content"*.

2. On December 22, 2020, the SCS decided to partially approve the request for access to public information. Specifically, it estimates access to data relating to the number of professionals directly involved in the voluntary termination of pregnancy, but not with respect to those who have expressed conscientious objection, since *"[...] is not available of a list of professionals who declare themselves objectors"*.

In particular, the SCS states that although Organic Law 2/2010, of March 3, on sexual and reproductive health and the voluntary termination of pregnancy, recognizes the right to conscientious objection of health care professionals health directly involved, and the need for this decision to be known by the affected centers in advance and in writing, the regulations do not include *"the obligation to have a register of professionals objecting to this provision"*.

3. On January 19, 2021, the applicant submits a claim to the GAIP in which he considers that the application should have been assessed in its entirety for the following reasons:

"[...] the Catalan Health Service or by extension the Generalitat de Catalunya, as a public administration with competences on Health, has information on which health professionals attached to the public sector have notified the administration of their right to conscientious objection in the matter of voluntary termination of pregnancy. The fact that this information is not systematized or included in a register should not be an impediment for it to be provided in response to a request for the right of access to public information.

[...] However, it must be remembered that the request for the right of access does not in any case request the personal data on who the health professionals are who have expressed conscientious objection. The sole objective of the request is to obtain a list of professionals who have done so, distributed by basic health areas. No personal data of any kind is requested under any circumstances.

[...] This petition is part of a process of preparing a journalistic report on women's right to voluntary termination of pregnancy in Catalonia [...]."

4. On January 26, 2021, the GAIP sent the claim to the SCS, requesting a report that set out the factual background and substantiate its position in relation to the claim, as well as the complete file and, where appropriate, specify the third parties who are affected by the claimed access.

5. On February 11, 2021, the SCS sends a legal report in which it reproduces the statements that were communicated to the claimant on December 22, 2020 and adds that the partial estimate of the request it was carried out following the explanations provided by the unit responsible for the information.

However, it reports that *"the same responsible unit also requested information from the SISCAT centers with gynecology and obstetrics services - sexual and reproductive health care units (ASSIR) and hospital centers - the number of obstetric professionals -gynecologists directly involved in the voluntary termination of pregnancy and also the number of those who have expressed their conscientious objection to performing the IVE in case they had this information given that, as already mentioned, Catsalut does not have this centralized information.*

Thus, on January 29, the following documentation was delivered (excel attached) in which it was reported:

- Years from 2015 to 2020*
- By province and type of service (hospitals or ASSIR)*
- Total number of obstetrics and gynecology professionals*
- Number of conscientious objectors for article 14 (will of the woman)*
- Number of objectors for any other reason (medical, danger to life, etc.)*

Collecting information from approximately 80% of the total ASSIR and hospital centers in Catalonia with obstetrics and gynecology services.

He was also informed (annex 611) of the reason for the aggregation of the information:

"The aggregation of data is determined in application of the General Data Protection Regulation that regulates the so-called special categories of data, among which there are data relating to health, and with Organic Law 3/2018, of 5 of December, of general data protection and guarantee of digital rights and the regulations that develop it, with the aim of guaranteeing data protection to avoid the indirect identification of the natural persons subject to the request."

6. On February 12, 2021, the GAIP addresses a request for a report to this Authority, in accordance with the provisions of article 42.8 of Law 19/2014, of December 29, on transparency, access to public information and good governance.

Legal Foundations

I

In accordance with article 1 of Law 32/2010, of October 1, of the Catalan Data Protection Authority, the APDCAT is the independent body whose purpose is to guarantee, in the field of the competences of the Generalitat, the rights to the protection of personal data and access to the information linked to it.

Article 42.8 of Law 19/2014, of December 29, on transparency, access to public information and good governance, which regulates the claim against resolutions on access to public information, establishes that if the refusal has been based on the protection of personal data, the Commission must issue a report to the Catalan Data Protection Authority, which must be issued within fifteen days.

For this reason, this report is issued exclusively with regard to the assessment of the incidence that the requested access may have with respect to the personal information of the persons affected, understood as any information about an identified or identifiable natural person, directly or indirectly, in particular through an identifier, such as a name, an identification number, location data, an online identifier or one or more elements of physical, physiological, genetic, psychological, economic, cultural or social of this person

(art. 4.1 of Regulation 2016/679, of April 27, 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 (General Data Protection Regulation, hereafter RGPD).

Therefore, any other limit or aspect that does not affect the personal data included in the requested information is outside the scope of this report.

The deadline for issuing this report may lead to an extension of the deadline to resolve the claim, if so agreed by the GAIP and all parties are notified before the deadline to resolve ends.

Consequently, this report is issued based on the aforementioned provisions of Law 32/2010, of October 1, of the Catalan Data Protection Authority and Law 19/2014, of December 29, of transparency, access to public information and good governance.

In accordance with article 17.2 of Law 32/2010, this report will be published on the Authority's website once the interested parties have been notified, with the prior anonymization of personal data.

II

At the outset, and based on the information contained in the file, it is considered necessary to underline the fact that although the person making the claim alludes several times to which the request for access is addressed to “[.. .] obtain a list of health professionals who have expressed conscientious objection to the voluntary interruption of pregnancy”, terms from which it could be deduced that it seeks to know the identifying data of those affected by the request, it is also important to have present the nuances that he later introduces to clarify that his claim is to know the total number of health professionals directly involved in the voluntary termination of pregnancy, and with respect to these, which would have alleged conscientious objection.

Taking this into account, the analysis of the claim presented to the GAIP will be carried out in relation to the claim of access to information relating to the number of healthcare professionals, and not to their identification.

Article 4.1 of the RGPD considers “personal data”: *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”*

In the case at hand, it seems clear that knowing the number of health professionals who are directly involved in the voluntary termination of pregnancy, as well as those who would have exercised conscientious objection, is not information which by itself allows to identify - them or make them identifiable.

However, the person making the claim requests that the information be provided in a segmented manner for each year (between 2015 and 2020, both included), basic area and, as regards health professionals who would have exercised conscientious objection, the professional category.

Considering that the request is not limited solely to the number of professionals directly involved in the voluntary termination of pregnancy, and in relation to these, those who would have exercised conscientious objection, it is necessary to analyze to what extent available the information segmented by years, basic area and professional category could identify the healthcare professionals affected by the access request and, consequently, if the data protection regulations apply.

Recital 26 of the RGPD, in relation to article 4.1, provides that to determine whether a natural person is identifiable “[...] deben tenerse en cuenta todos los medios, como la

*singularization, which can reasonably be used by the controller or any other person to directly or indirectly identify the natural person. To determine whether there is a **reasonable probability that means will be used to identify a natural person, all objective factors must be taken into account, such as the costs and time required for identification, taking into account both the technology available at the time of the treatment as technological advances.** Therefore, the principles of data protection should not be applied to anonymous information, that is, information that is not related to an identified or identifiable natural person, nor to data converted into anonymous data in such a way that the interested party is not identifiable, or to be Consequently, this Regulation does not affect the treatment of said anonymous information, including for statistical or research purposes".*

In the case at hand, although it is clear that having only the number of health professionals and the number of objectors would not allow to directly identify the people affected by the request, if the segmentation by basic area and categories is added professionals of those who have exercised conscientious objection, knowing all this information simultaneously can determine a reasonable risk of identification of health professionals.

This will be the case, for example, in cases where a certain health care device for the IVE is made up of a small number of professionals, or even being of a higher number, all the members that the integren has exercised this option. In these cases, based on the data that is sought to be accessed, as well as others that can reasonably be accessed, the professionals who have exercised conscientious objection or, conversely, those who have not exercise Indeed, this will be even more evident in cases in which it is known that in a certain healthcare facility all healthcare professionals have exercised conscientious objection, or if this data affects a certain professional group.

For this reason, in the case at hand, the data protection regulations will be fully applicable to the extent that the person claiming can be fully or partially identified in a reasonable way the professionals directly involved in the healthcare provision related to the voluntary termination of pregnancy.

III

Since the data protection regulations apply, it should be taken into account that article 4.2) of the RGPD, in relation to articles 2.1 and 4.1), provides that it applies to *"any operation or set of operations carried out on personal data or sets of personal data, whether by automated procedures or not, such as collection, registration, organization, structuring, conservation, adaptation or modification, extraction, consultation, use, communication by transmission, dissemination or any other form of enablement of access, comparison or interconnection, limitation, suppression or destruction"*.

Article 5.1.a) of the RGPD provides that any processing of personal data must be lawful, loyal and transparent in relation to the interested party and, in this sense, the RGPD establishes the need to participate in one of the legal bases of article 6.1, among which section c) provides for the assumption that the treatment *"is necessary for the fulfillment of a legal obligation applicable to the person responsible for the treatment"*.

As can be seen from article 6.3 of the RGPD and expressly included in article 8 of the Organic Law 3/2018, of December 5, on protection of personal data and guarantee of digital rights (LOPDGDD), the processing of data can only be considered based on this basis when it is established by a rule with the rank of law.

For its part, article 86 of the RGPD provides that *"the personal data of official documents in the possession of any public authority or public body or a private entity for the performance of a mission in the public interest may be communicated by said authority, organism or entity in accordance with the Law of the Union or of the Member States that applies to them in order to reconcile the public's access to official documents with the right to the protection of personal data under this Regulation"*.

According to the analysis previously carried out, the regulation and guarantee of public access to official documents held by public authorities or public bodies is regulated in our legal system in the LTC, which recognizes people the right of access to public information, understood as such *"the information prepared by the Administration and that which it has in its power as a result of its activity or the exercise of its functions, including that supplied by the other obliged subjects in accordance with the provisions of this law"* (article 2.b) and 18 LTC). State Law 19/2013, of December 9, on transparency, access to public information and good governance (hereafter, LT), is pronounced in similar terms, in its articles 12 (right of access to public information) and 13 (public information).

In the case at hand, given the documentation to which the claimant intends to access, regarding the total number of health professionals who have been directly involved in the provision of care related to voluntary terminations of pregnancy, as well as those who would have expressed conscientious objection, it can be concluded that this information must be considered public for the purposes of article 2.b of the LTC and subject to the right of access (article 18 LTC) as it is documentation that is in possession of the SCS. It must be noted, however, that this right of access is not absolute and can be denied or restricted for the reasons expressly established in the laws, as is the case with the limits of articles 23 and 24 of the LTC regarding personal data.

IV

From the point of view of the protection of personal data, the fact that the person making the claim may know the identity of the health professionals affected, even if indirectly, and also the knowledge that any third party who may have access to the information that it publishes - it must be remembered that the objective is the preparation of a journalistic report on the right of women to the voluntary termination of pregnancy - is particularly relevant when it relates to the exercise of the objection of conscience.

The exercise of conscientious objection in the matter of voluntary termination of pregnancy by health professionals who are directly involved in this type of care provision is recognized in article 19.2 of Organic Law 2/2010, of March 3, sexual and reproductive health and voluntary termination of pregnancy. This article regulates this right in the following terms:

"Health professionals directly involved in the voluntary termination of pregnancy will have the right to exercise conscientious objection without the access and quality of care being provided being impaired by the exercise of conscientious objection. The rejection or refusal to carry out the intervention of interruption of the pregnancy for reasons of conscience is always an individual decision of the health personnel directly involved in the carrying out of the voluntary interruption of the pregnancy, which must be manifested in advance and in writing. [...]"

The appeal to reasons of conscience to make the objection places us in the framework of the ideology, beliefs or religious or philosophical convictions of the people. In this sense, the Constitutional Court (Plenary), in judgment 53/1985, of April 11, ruled in relation to the previous appeal of unconstitutionality presented against certain aspects of the draft organic law reforming the Article 417 bis of the Penal Code, according to the text approved by the Senate in the plenary session of November 30, 1983, and in relation to the decriminalization of abortion, established the following: *"[...] it should be noted, as regards the right to conscientious objection, which exists and can be exercised regardless of whether or not such a regulation has been issued. Conscientious objection **is part of the content of the fundamental right to ideological and religious freedom recognized in article 16.1 of the Constitution** and, as this Court has indicated on several occasions, the Constitution is directly applicable, especially in matters of fundamental rights."*

Therefore, to the extent that the conscientious objection is linked to the ideology, religion or beliefs of the healthcare professional, the claimant's claim to access must be analyzed from the point of view of article 23 of the LTC, which provides that *"Requests for access to public information must be denied if the information sought contains particularly protected personal data, such as those relating to **ideology**, trade union affiliation, **religion**, beliefs, racial origin, health and sex life, and also those relating to the commission of criminal or administrative offenses that do not entail a public reprimand to the offender, unless the affected person consents expressly by means of a written document that must accompany the request."*

In accordance with this provision, and in relation to the case at hand, the access request that seeks to access the personal data of health professionals who have exercised conscientious objection, whether because they are requested data that would allow them to be identified directly (for example, in cases where, in addition, identifying data is requested), that is because, as is the case at hand, from the information they could be identified indirectly to all or part of the professionals, article 23 of the LTC excludes their access and therefore the request must be denied.

However, it is necessary to bear in mind the provision of article 25.1 of the LTC by which *"if any of the limits of access to public information are applicable [...] the denial of access only affects the corresponding part of the documentation, and restricted access to the rest of the data must be authorized"*. Article 68.2 of Decree 8/2021, of February 9, on transparency and the right of access to public information is pronounced in similar terms, whereby *"partial access must be given to information that is not affected by the restriction as long as it does not reveal information that has been legally hidden.[...]"*

In accordance with the provisions of Opinion 05/2014 on anonymization techniques of the Group of Work on Data Protection of Article 29, aggregation is an anonymization technique that

must prevent "[...] that an interested party is singled out when he is grouped together with, at least, a number k of people. To achieve this, the values of the attributes are generalized to the point that all people end up sharing the same value. For example, by reducing the granularity of a place (city or region), many interested parties will share those values [...]"

Transferred to the case at hand, and given that, according to the report sent to the GAIP on February 11, 2021 by the SCS, providing information at the level of basic areas would in certain cases allow the indirect identification of the people affected, to make effective the exercise of right of access to public information and to guarantee the protection of the data of the affected persons, the approach that is highlighted in the aforementioned report sent to the GAIP, in which the SCS informs that it should already communicated to the person claiming part of the information, but having aggregated the information at the provincial level. This as long as the communication of the information segmented by province, instead of by basic areas, guarantees the non-identification of the people affected.

conclusion

Given that the information requested affects the field of ideology, beliefs, religion or philosophical convictions of people, it is not possible to provide information that directly identifies the people affected, nor the number of personnel affected at a level of aggregation that allows you to identify your ideological option with regard to conscientious objection.

Barcelona, February 25, 2021