

CNS 10/2022

Opinion in relation to a Hospital's consultation on access to identifying data due to the exercise of the right of access to the clinical history access register

A letter from the Data Protection Delegate of a Hospital is presented to the Catalan Data Protection Authority, in which an opinion is requested from this Authority in relation to access to identifying data for the purpose of exercising the right to 'access to the access register of the clinical history.

The query asks the following questions:

"- In the event that, after following the procedure established at the Hospital to resolve requests for exercise of access to the clinical history register, it is detected that there have been no improper accesses, the interested party subsequently addresses via the transparency portal to request his identity, can the Hospital provide him with the user data that is objectively contained in the access register?

- In the affirmative, the interested party could access the user's data through this route, which includes access to their history as a result of the previous resolution of the request to the Hospital of Exercise for access to the register access to your medical history. In this situation, if the interested party then goes to the Hospital with the list of users who have access to their history, in order to know nominally the category of due or improper access by way of the procedure of rights protection, would the Hospital be legitimate to give access to this information?"

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

As the consultation explains, the Hospital previously made a consultation with this Authority in relation to the possibility of providing the interested party with "the identification data of the professional who has been considered to have accessed the clinical history of a patient improperly.". In relation to this consultation, Opinion CNS 48/2021 was issued, which concludes as follows:

"Access to the identity of the people who provide services to the data controller who have accessed the clinical history is not part of the content of the right of access recognized by the RGPD.

However, based on article 6.1.c) RGPD and the transparency regulations, the Hospital can communicate to patients who request it the information related to access to their HC, including the identity, position or the category of professionals who have accessed it, as well as any relevant information about access (date and time of access, and/or center, module or unit from which it occurred and reason), without that the consent of the affected professionals is necessary."

The consultation that is now being formulated explains that the Hospital would have followed this line of action when responding to the requests of its patients in relation to the exercise of the right of access to the access register in the medical history, indicating (to the applicants) that the application can be conveyed in accordance with the Transparency Law.

The consultation recalls that in 2021 the Hospital received a request from a patient in order to know access to her clinical history, and that in the response she was told "that no improper access had been detected , having all been assessed as due".

The consultation adds that, having resolved the above, the Hospital would have received a new request for access to public information from the patient herself, who "requests to know the identification data of the professionals who have accessed her history, still that it has been properly".

Based on what has been presented, the consultation formulates the following questions:

"- In the event that, after following the procedure established at the Hospital to resolve requests for exercise of access to the clinical history register, it is detected that there have been no improper accesses, the interested party subsequently addresses via the transparency portal to request his identity, can the Hospital provide him with the user data that is objectively contained in the access register?

- In the affirmative, the interested party could access the user's data through this route, which includes access to their history as a result of the previous resolution of the request to the Hospital of Exercise for access to the register access to your medical history. In this situation, if the interested party then goes to the Hospital with the list of users who have access to their history, in order to know nominally the category of due or improper access by way of the procedure of rights protection, would the Hospital be legitimate to give access to this information?"

Based on these terms, it should be noted that Regulation (EU) 2016/679, of the Parliament and of the European Council, of April 27, 2016, General Data Protection (hereafter, RGPD), establishes that all processing of personal data must be lawful, fair and transparent (article 5.1.a)).

The historical clinic collects the set of documents relating to the healthcare process of each patient while identifying the doctors and other healthcare professionals who have intervened (art. 9.1 Law 21/2000 of December 29, on the rights of information concerning the patient health and autonomy, and clinical documentation), and contains the information detailed in article 10.1 of Law 21/2000, to which we refer.

In the same sense, the provisions of Law 41/2002, of November 14, basic regulation of patient autonomy and rights and obligations in the field of information and clinical documentation.

The processing of data of natural persons, holders of the clinical history available to the Hospital, is subject to the principles and guarantees of the protection regulations

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

III

As was already agreed in CNS Opinion 48/2021 (FJ III), it is necessary to start from the basis that the exercise of the right of access to the own personal information by a patient, in the terms of article 15.1 RGPD, does not include the right to know the identity of the professionals who have accessed this patient's clinical history, for which a health center is responsible, such as the Hospital making the consultation.

This consideration, which is sufficiently explained in previous pronouncements of this Authority (CNS 15/2016, CNS 8/2019, CNS 53/2019, or CNS 48/2021), to which we refer, is not incompatible with the possibility that a patient has the right to know the identity of the professionals who have accessed their clinical history, based on other regulations, such as the right of access to public information recognized by the transparency regulations.

Regarding this, as is also agreed in Opinion 48/2021 (FJ IV), Law 19/2014, of December 29, on transparency, access to public information and good governance (LTC), which aims to, among others, "regulate and guarantee people's right of access to public information and documentation" (article 1.1.b)), result of application to the case raised (article 3.1.d) LTC), and can enable the patient's access to the record of access to their clinical history, specifically, to the identity of the professionals who accessed it, in the terms set out in CNS Opinion 48/2021.

In summary, the information relating to the traceability of access to a patient's clinical history would be public information (art. 2.b) LTC), and remains subject to the access regime provided for in this regulation (arts. 18, 20 and following LTC). Specifically, as already pointed out, in the face of these requests it is necessary to apply article 24.2 LTC, according to which "(...) access to the information can be given, with the prior weighting of the reasoned interest public in the disclosure and the rights of the people affected."

With regard to access to the identification data of professionals who have accessed a patient's medical history, the purpose of this access must be taken into account (art. 24.2.b) LTC).

Remember that the exercise of the right of access to public information is not subject to motivation (art. 18.2 LTC), although the fact that the applicant expresses what is the purpose he pursues and the reasons for which he wants to know the information, may be relevant when deciding on the prevalence between the right to access of the applicant and the right to data protection of the affected persons (the Hospital's professionals).

It must be remembered that the right of access to public information can legitimately respond to particular interests (art. 22.1 LTC).

Thus, **patients treated in health centers may have a legitimate interest in knowing what accesses have occurred to their personal information** (clinical history), which is the main instrument for managing patient information, which has an impact on the health care you receive and, ultimately, your health status.

This access would allow patients, if necessary, to exercise the defense of their interests in relation to the assistance received, in case they detect, for example, any improper or irrelevant access to their clinical history.

Remember, in this regard, that the patient autonomy legislation regulates a patient's right to information in fairly broad terms (article 2.2 Law 21/2000 and art. 4 Law 41/2002), by establishing that the latter must be able to have all the information referring to the different aspects that have an impact on your treatment and, ultimately, on your health.

In addition, data protection legislation imposes the obligation on the data controller to adopt the necessary technical and organizational measures to guarantee the security of personal data processed, including protection against unauthorized or unlawful processing (articles 5 and 24 RGPD).

At the same time, it recognizes the affected person's right to submit a claim before, in this case, this Authority when it considers that there has been a breach or infringement of the data protection regulations affecting the processing of their personal data (articles 77 RGPD), as could be the case if there has been improper access to your medical history data. This, without prejudice to being able to take other legal actions that it deems appropriate.

The authorization for the patient's access to the information in the access register would be based on the legitimate interest that generally needs to be recognized to the holders of the information (additional provision ten LOPDGDD), which is a weighting element which would justify, from the perspective of data protection regulations, the patient's access to the access register and, therefore, to the data of the affected professionals.

For all this, as this Authority has already done, it is clear that the patient's legitimate purpose entails that he can obtain sufficient information to be able to know which accesses have occurred, and to be able to confirm or contrast whether these accesses to his information health (information considered to be of special protection by data protection regulations, eg art. 9 RGPD), are appropriate or not.

As this Authority also pointed out, it must be borne in mind that providing information on the accesses produced without identifying the professionals who have accessed the clinical history, would not allow to verify whether the accesses to the clinical history are really justified or not, that is to say, if they have been carried out by professionals who are authorized to access them when responding to these accesses to assistance or administrative actions.

To this end, we reiterate that it would be necessary to be able to have the identity of these professionals, so that it is the affected person who can examine and contrast whether access to their own information has been proper or improper.

On the other hand, for the purposes of the application of article 24.2 LTC, it will obviously have to be taken into account in requests for access to information on the traceability of clinical histories, the possible impact that access to the record of access to the clinical history may have on those professionals who have accessed it.

In general, as was already done in agreement (FJ IV Opinion CNS 48/2021), taking into account the obligations of the health center itself regarding the management and protection of the information contained in the clinical history (art. 11 Law 21 /2000), and that he must have informed his professionals about the correct management of clinical histories (in consideration of the duty of secrecy required of these professionals, ex. art. 11.6 Law 21/2000, and the principles of protection of data, specifically, of integrity and confidentiality, eg art. 5.1.f) RGPD), it does not seem that the expectation of privacy of the professional fingers can, in general, be a sufficient limitation or counterweight to prevent the patient from knowing the identity of the professionals who have accessed their clinical history.

All this, without prejudice to the fact that, as was also indicated in CNS Opinion 48/2021 (FJ V), if the request for public information may affect the rights or interests of third parties, identified or easily identifiable, they have to transfer the request, so that they can make the allegations they consider appropriate, in those cases where they can be decisive for the meaning of the resolution (art. 31 LTC).

IV

Focusing on the inquiry that is being made now, the first question refers to the "procedure" that the hospital would follow in relation to this type of request. According to what is clear from the question posed, said procedure would consist in that, in the face of a request for exercise of access to the access register of a patient's clinical history, once "it is detected that there is no there have been improper accesses" the patient would be informed in this regard. Having done this, in the event that the interested party insists on knowing the identity of the people who have made the accesses, they ask if they could be provided with "the user data that is objectively recorded in the access register".

It seems, therefore, given the information available, that the consultation considers that in the face of a first request, the Hospital can establish as a usual procedure a prior assessment of the accesses made to the clinical history of the patient who claims the information, determine which accesses it considers proper and which could be improper and, where appropriate, indicate to the patient that improper accesses have not been detected.

Starting from the basis that, as has been said, a legitimate interest on the part of the patient can be recognized to access the information about the accesses made to their clinical history in the terms indicated by this Authority, it is necessary to remember what was also agreeing to FJ IV of Opinion CNS 48/2021:

"In any case, providing the information as indicated in the query ("only the interested party is notified if the access has been due or improper"), without identifying the professionals who have accessed the HC, does not seem to allow ascertaining whether the accesses to the HC are really justified or not, that is to say, whether they have been carried out by the professionals who are legitimate to access them when responding to these accesses to assistance or administrative actions. For this purpose, it is necessary to be able to have the identity of these professionals, so that it is the person affected (and not the Hospital, making a prior filter of the required information), who can check whether the accesses are justified or not ."

Therefore, for the purposes of interest, and although at first the Hospital was able to indicate to a patient that no improper access had occurred, it must be reiterated that this Authority considers that the information provided has not been of circumscribing only to indicate whether the health center considers that there have been improper accesses or not.

The patient, in view of the aforementioned legislation (legislation of patient autonomy, and transparency legislation, in connection with article 6.1.c) RGPD), must be able to know the identity of the people who have accessed the your medical history and, where applicable, the circumstances and reasons for this access, as already collected in Opinion CNS 48/2021, to which we refer.

v

With regard to the second question, it focuses on determining whether through the rights protection procedure - we understand that you are referring to the exercise of the right of access provided for in the

data protection regulations could give access to information about whether it is due or improper access.

In CNS Decree 48/2021, the content of the right of access provided for in the data protection regulations (art. 15 RGPD) and, as can be seen from the exposition that was made there, this right does not extend to being able to obtain the information of whether the entity responsible for the treatment considers that the accesses be due or improper.

In any case, apart from this, if the controller has this information, that is to say, if he has an analysis on whether a certain access is due or improper, the data protection regulations would not prevent the person holding the medical history can access this information.

In accordance with the considerations made in this report in relation to the query raised, the following are made,

Conclusions

The patient, in view of the legislation studied (legislation of patient autonomy and transparency legislation, in connection with article 6.1.c) RGPD), must be able to know the identity of the people who have accessed their medical history and, where applicable, the improper accesses that may have occurred.

Although it is not part of the right of access provided for in the RGPD, the data protection regulations do not prevent the person holding the medical record from accessing information on the proper or improper nature of access to the clinical history, if the person in charge has this information.

Barcelona, April 21, 2022