

CNS 11/2022

**Opinion in relation to the inquiry made by the legal representative of a foundation regarding access to clinical history by social educators**

A query formulated by the Catalan Data Protection Authority is presented legal representative of a foundation in which he raises the possibility that the social educators of the mental health day hospitals for adolescents that he manages can access the clinical history of the foundation's patients.

In particular, it explains that it is an institution specialized in comprehensive community mental health care for children, adolescents and families, which manages different mental health day hospitals for adolescents. The social educators of these centers have requested to be able to access the clinical histories of the patients in order to be able to carry out their functions.

This permission, continuously, has been denied to them until now as they are not considered health personnel.

The consultation states that the functions assigned to social educators are the following:

*"- Supporting the patient from consideration of the other, from interest and respect, fruits of a will to work, service and dedication. This attention and establishment of links is carried out through the direct personal care relationship and through the mediation of recreational spaces and activities that facilitate this process.*

- *Workshop planning (plastic, fun, physical activities, etc.)*
- *Participation in the team's clinical sessions.*
- *Management and complementation of the computer program [...].*
- *Elaboration of reports -*

*Participation in meetings and weekly clinical supervisions.*

- *Any other function assigned by the hierarchical superior of your category.*

The consultation also raises whether the fifteenth additional provision of Law 12/2007, of October 11, on social services, relating to the communication of data between health services and social services of the public system, is applicable. introduced by article 71 of Law 2/2021, of December 29, on fiscal, financial, administrative and public sector measures.

Having analyzed the query, and in view of the current applicable regulations, this Legal Advice informs the following:

I

(...)

## II

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 movement of such data and by which repeals Directive 95/46/CE (General Data Protection Regulation), hereinafter RGPD, provides that its provisions are applicable to the treatments that are carried out on any information *"on 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"* (arts. 2.1 and 4.1).

On the other hand, article 4.2) of the RGPD considers treatment *"any operation or set of operations carried out on personal data or sets of personal data, either by automated procedures or not, such as collection, registration, organization, structuring, conservation, adaptation or modification, extraction, consultation, use, communication by transmission, diffusion or any other form of enabling access, comparison or interconnection, limitation, deletion or destruction"*.

The RGPD provides that all processing of personal data must be lawful, loyal and transparent in relation to the interested party (article 5.1.a)) and, in this sense, establishes a system of legitimation of data processing that is based on the need for any of the legal bases established in its article 6.1, including 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 conferred public powers to the data controller.

In the case at hand, the query raised refers to the possibility of the social educators of the foundation's adolescent mental health day hospitals to access the patients' clinical history.

The clinical history is regulated in Law 41/2002, of November 14, basic regulation of patient autonomy and rights and obligations in the field of clinical information and documentation, basic rule in accordance with its additional provision first, and Law 21/2000, of December 29, on the rights of information concerning the patient's health and autonomy, and clinical documentation.

Law 21/2000 establishes that the clinical history *"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), and provides that this documentation the information relating to the clinical care data must be included, such as the description of the current illness or health problem (art. 10.1.b), and where applicable, the social report (art. 10.1.c).

To the extent that article 4.15 of the RGPD considers that data relating to health refers to *"[...] the physical or mental health of a natural person, including the provision of health care services, that reveal information about your state of health"*, access to the medical history affects 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 h may apply), referring to cases in which *"the treatment is necessary for the purposes [...] provision of health or social care or treatment, or management of health and social care systems and services, on the basis of the Law of the Union or Member States or under a contract with a health professional [...]"*.

In relation to this issue, it is necessary to take into account art. 9.3 of the RGPD, whereby the data referred to in article 9.1 of the RGPD:

*"[...] may be treated for the purposes referred to in section 2, letter h), when the treatment is carried out by a professional subject to the obligation of professional secrecy, or under his responsibility, according to Union Law or the Member States or with the rules established by the competent national bodies, or by any other person also subject to the obligation of secrecy in accordance with the Law of the Union or the Member States or the rules established by the competent national bodies"*.

In accordance with the provisions of these articles, the legal basis of the indicated treatment must be established in the law of the member state that applies to the person in charge or in the law of the European Union which, in any case, has to determine the purpose of the treatment. The referral to the legitimate basis established in accordance with the internal law of the member states requires, in our case, in accordance with article 53 of the Spanish Constitution, that the rule of development, to be a fundamental right, have the rank of law.

In this sense, article 8.2 of Organic Law 3/2018, of December 5, on Protection of Personal Data and guarantee of digital rights (hereafter LOPDGDD) establishes the legal scope of the enabling rule. Article 9 of the LOPDGDD is pronounced in similar terms regarding the processing of data of special categories of data, such as health data.

### III

In relation to the use of the medical history of the teams that make up the centers, services and establishments of the health services and, specifically, the possibility of social educators accessing it, reference should be made to article 11 of Law 21/ 2000, and in similar terms article 16 of Law 41/2002.

In particular, article 11.1 of Law 21/2000 provides that the medical history is the instrument primarily intended to help guarantee adequate assistance to the patient. And, with regard to private use, in the following sections it provides for different authorizations for access and use of the clinical history, such as access by the care professionals of the center involved in the diagnosis or treatment of the patient (section 1), or the access of the staff who take care of the tasks

of administration and management of the centers, with regard to the data contained in the clinical history and related to said functions (section 4).

Article 11 of Law 21/2000 also refers, in the sixth section, to the fact that *"All personnel who access in the use of their powers any type of data from the clinical history remain subject to the duty to keep - the secret"*. This provision must be taken into account for the purposes of Article 9.3 of the GDPR.

According to what follows from this article, access would be enabled for professionals who intervene in the care process of a patient, and who, in the use of their competences, must access certain information that recorded in the clinical history.

According to the foundation, the social educators of the day hospitals request access to the clinical history of the patients in order to be able to properly carry out their functions, which include their participation in the clinical sessions of the team, participation in weekly clinical supervisions, preparation of reports, etc.

The analysis in relation to the legal basis of this treatment must be based on Law 15/1990, of 9 July, on the health management of Catalonia, which creates the Catalan Health Service with the aim of carry out an adequate organization and arrangement of the healthcare system in Catalonia (art. 3) i it attributes, among others, the function of managing psychiatric care and promotion, protection and improvement of mental health (art. 8.g).

At the same time, from article 43 of Law 15/1990, the Integrated Health System for Public Use of Catalonia (SISCAT) is established as an instrument aimed at the public provision of health care, in particular, to achieve a optimal organization of health services of public coverage that allows the appropriate homogenization of benefits and the correct use of human and material resources, the centers, services and health establishments of the public system.

Decree 196/2010, of December 14, of the integral health system for public use of Catalonia (SISCAT), in article 20, establishes the need to establish quality standards for each type of service, through a order of the Minister of Health, at the proposal of the Board of Directors of the Catalan Health Service, which must provide for aspects related to the organization and personnel, the quality of health care and overall attention to the user and aspects relating to structure, facilities and equipment.

Community mental health centers and services are included in the scope of application of Decree 196/2010, in accordance with the provisions of article 1 in relation to article 11. And, in relation to quality standards, reference should be made to the Annex to Order SSS/166/2002, of May 13, which regulates the quality standards that must be met by mental health centers, services and establishments public use of Catalonia (DOGC no. 3642 of 24.05.2002).

The annex to Order SSS/166/2002 (henceforth, the Order) provides that, with regard to care documentation (point A. 3.1), in any of the mental health centers, services and establishments the clinical history must include, among others, the somatic, functional, psychological and social medical assessment, the follow-up or the prescription and administration of drugs in writing with the signature of the person responsible, and in relation to human resources (point A .4), they must

have a basic multidisciplinary care team and capacity for mental health care.

In particular, with regard to partial hospitalization centers, it foresees that the team must make it up, it is understood that at least (since the article talks about a basic multidisciplinary team), a *"psychiatrist/ psychiatrist or doctor with professional experience in psychiatry of more than 7 years, psychologist, diploma in nursing, preferably with qualification or specific training in psychiatry and social worker"*.

The Order also provides, in point B.8, specific standards for partial hospitalization services, among which it lists the need to establish individualized programs of treatment, rehabilitation and reintegration into the community, as well as carrying out therapeutic activities, of occupational and leisure therapy, both individual and group.

Thus, the professionals who are part of the basic multidisciplinary team of the partial hospitalization centers would be able to access the personal data contained in the patients' clinical history as long as access is limited to data related to their functions.

On the basis of what has been presented, and to the extent that the centers of the foundation formulating the consultation are considered partial hospitalization centers, the regulations analyzed would enable the processing of the personal data of patients who receive assistance in the day hospitals of the foundation on the legal basis referred to in articles 6.1.e) and 9.2.h) of the RGPD.

This treatment, from the perspective of the foundation, would obviously cover the information that must be included in the clinical history generated by the day hospital, in accordance with what is provided for in article 9.1 in relation to article 10 of the Law 21/2000, and also with respect to the information of the patients it attends that may appear in the shared clinical history of Catalonia (HC3), by virtue of what is provided for in Instruction 06/2020, of the Catalan Health Service, *of Implantation of the management assignment of the Department of Health to the Catalan Health Service so that the latter manages the linkage and access to the shared clinical history (HC3) of the care centers integrated into the integral health system of public use in Catalonia (SISCAT) and other providers of the public health system.*

Thus, it seems clear that professionals who are part of the basic multidisciplinary team of partial hospitalization centers would be able to access the personal data contained in the clinical history generated by the day hospital itself and that of the HC3, as long as it is limited to what is necessary with respect to its functions.

In any case, it must be borne in mind that the fact that a certain professional profile may be able to access the clinical history within the framework of their competences, does not necessarily mean that they can access it in a complete and indiscriminate manner regarding all information or all clinical histories.

From the point of view of data protection regulations, and in accordance with the principle of minimization and integrity and confidentiality of personal data, the accesses that may occur in the medical history must be justified not only from the point of view of the profile of the professionals who require access, in terms of permissions, but it is also necessary to ensure that

access is only carried out with respect to that information required in the exercise of its functions and with respect to the patients in whose care process it intervenes.

The query raised, however, refers specifically to the possibility of social educators accessing it. In accordance with point A.4 of the annex to the aforementioned Order, social educators are not part of the basic multidisciplinary team of partial hospitalization centers.

Partial hospitalization centers must carry out rehabilitation and community reintegration activities, therapeutic activities, individualized and group occupational and leisure therapy and psychosocial rehabilitation among others where the intervention of these professionals may be necessary. Therefore, based on the information collected in the consultation on the functions performed by social educators, it seems clear that they must be able to access certain clinical information of the people they care for.

In this sense, the foundation refers to the fact that the social educators of the mental health day hospitals for adolescents that it manages request access to the clinical history in order to carry out the functions referred to in the consultation (mediation of fun spaces and activities, participation in the team's clinical sessions, participation in the weekly clinical supervisions, preparation of reports, etc.).

From the point of view of the patient autonomy regulations, it should be noted that article 11 of Law 21/2000 refers to access to the clinical history by healthcare professionals involved in diagnosis or treatment of the patient, and it does not expressly refer to what must be health professionals, in the sense of Law 44/2003, of November 21, on the organization of health professions, to which we refer.

Consequently, it is considered that the access to the medical history referred to in article 11 of Law 21/2000 should not be interpreted exclusively with respect to healthcare professionals, but also to other professionals who, depending on their competences, they intervene in the care process, as can be, in the case at hand, social educators to the extent that they are involved in the treatment of the patient.

For this reason, given the functions of the social educators, it seems clear that they must be able to access the clinical history recorded in the hospital of the day and that in accordance with section 3.1 of the Annex to Order SSS/166/ 2002, mentioned, must contain:

- Somatic, functional, psychological and social medical assessment.
- Tracking.
- Prescription and administration of drugs in writing with the signature of the person responsible.
- Registration reports

Anyway, brought to the case at hand, in which the foundation exposes that the social educators of the adolescent mental health day hospitals it manages perform different functions such as planning workshops, participation in the clinical sessions of the team, elaboration

of reports, etc., it should be noted that it is not clear from this information if all the functions described are performed by all the social educators who request access to the clinical history.

Only educators who perform functions that require it should have access to this information, with respect to the patients they have to attend to.

On the other hand, based on the information available, it does not seem that in order to carry out the functions mentioned, the social educators must access the information contained in the HC3, insofar as in accordance with the provisions of Instruction 06/2020, all the clinical care data contained in the treatment of patients or equivalent treated in the health service provider entities integrated in the SISCAT, or other provider entities are part of the HC3 which, not being integrated into SISCAT, provide health services on behalf of CatSalut, as long as they maintain this public activity and the contracts to develop it remain valid (criterion 1 of the Annex, in relation to point 2 of Instruction 06/2020). This is without prejudice to the fact that, as has been explained, the members of the multidisciplinary team provided for in the aforementioned Order may have access to it.

For this reason, in relation to the first question raised, on the basis of article 6.1.e) and 9.2.h) of the RGPD and in relation to what is provided for in the regulations that have been analyzed, a priori the professional profile of social educators of the day hospitals to which the query refers they could access the patients' clinical history generated by the center itself, when their functions justify it, without this also entailing systematic and complete access to all the documentation contained in the clinical history or of all patients.

#### IV

The foundation also considers whether, in the case of the consultation, the additional fifteenth provision of Law 12/2007, of October 11, on social services, relating to the communication of data between health services and social services of the public system. This provision provides for the following:

*"1. In order to guarantee the effective comprehensive care of the people served by the Network of Social Services of Public Care and the health services of the public system, the communication of data between the aforementioned services is enabled, without the consent of the persons concerned, in the terms provided for in the following sections:*

*a) The social services are enabled to communicate to the health services the data related to the people served by both systems, of an identifying nature, of contact, and also those related to the social services received that may have an impact on health and are necessary to guarantee a comprehensive and integrated care process. Health professionals involved in the diagnosis or treatment of the interested person, duly accredited, can access the information.*

*b) The health services are enabled to communicate to the social services the data related to the people served by both systems, of an identifying nature, of contact, and also the data of their clinical history that may affect personal autonomy -whether due to dependency or disability-, to detect and intervene in situations of social risk that may require the activation of social benefits and that require health information to be effective, and in order to guarantee a process comprehensive and integrated care.*

*Social service professionals involved in the monitoring and evaluation of the citizen, duly accredited, can access the information.*

*2. The entities responsible for communications must apply technical and organizational measures appropriate to the sensitive nature of the information, in order to guarantee and periodically verify the confidentiality, integrity, traceability, availability and authenticity of the information, and also the exercise of rights and the duty to inform interested parties.*

*Traceability must allow the control of access to the information system by the profiles of authorized users, the identity and professional category of the user, the date and time when the access took place, the action taken, the data affected and the reason for the access.*

*The responsible entities must facilitate the consultation of the information on the traceability of their data to the affected persons.*

*3. Social and health services professionals must maintain the duty of secrecy regarding the information to which they have access, even after their relationship with the entity for which they provide services has ended."*

At the outset, it must be stated that this provision does not apply in the case raised by the foundation for the reasons set out below.

Mainly, because it must be taken into account that the fifteenth additional provision of Law 12/2007 (henceforth, the provision) refers to the communication of data of the people served between the entities or services of the Social Services Network of 'Public Care and the health services of the public system.

In the case of the query raised, the foundation refers to the access to the clinical history of the patients by the social educators who are part of the team of the mental health day hospitals for adolescents that it manages.

Without prejudice to the fact that the professional profile of social educators can also operate in the network of social services of public attention, in relation to the Portfolio of social services, it must be taken into account that the query raised does not refer to the communication of the data that they are recorded in the medical history from the foundation (center that belongs to the health services of the public system) to a center or service that belongs to the Network of Social Services of Public Care, but refers to access by educators social workers who belong to the multidisciplinary team of the partial hospitalization center in the clinical history.

Consequently, to the extent that the consultation does not refer to the communication of personal data in the sense provided for in the provision, that is to say, between the public health system and the network of public care social services, the provision does not is applicable in the case at hand.

It would be different if the request for consultation or communication of data does not originate from a professional who belongs to the health care team, but comes from a center or service social that belongs to the social service network of public attention. In this case, yes it could



the fifteenth additional provision of Law 12/2007 will apply. In any case it would be necessary take into account different issues.

Without intending to be exhaustive, first of all, it should be taken into account that the provision requires that the people affected by the communication of their data are served by both systems. Certainly, not all people cared for by the health system should be cared for by social services, nor should social services be able to access, without the consent of the people affected, the health services data of people they do not need to care for .

Secondly, from the perspective of the professionals who can access the information that is communicated in each case, the provision foresees that from the social services only the professionals involved in the monitoring and evaluation of the citizen, duly accredited, could access it. In other words, this does not necessarily cover all social services staff.

Thirdly, the information to which the social services can access within the framework provided for in the provision is specified in the identification and contact data, and in relation to the clinical history data, the information that may affect in personal autonomy (whether due to dependency or disability), to detect and intervene in social risk situations that may require the activation of social benefits and that require health information to be effective, and to guarantee a integral and integrated care process.

Finally, it should be borne in mind that the provision provides that in any case, the person responsible of the treatment must guarantee the application of appropriate technical and organizational measures to protect the information, and makes special reference to the control of the access of professionals to the information communicated, as well as the need to guarantee to the affected persons the consultation of the information on the traceability of their data.

In accordance with the considerations made in these legal foundations in relation to the query raised, the following are made,

## **Conclusions**

On the basis of patient autonomy regulations, and clinical documentation, in relation to the legal basis of article 6.1.e) and 9.2.h) of the RGPD, social educators' access to information contained in the clinical history of patients generated by adolescent mental health day hospitals would be able to the extent that it is relevant to the exercise of their functions in the terms set forth. On the other hand, a priori the access of social educators to the information that is part of the shared clinical history of Catalonia (HC3) would not be justified.

In the case of the query raised, the fifteenth additional provision of Law 12/2007, relating to the communication of data between health services and social services of the public system, does not apply.

Barcelona, April 21, 2022