IAI 4/2022

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 submitted by a citizen against a public entity for the denial of access to the traceability of access to her employment clinical history

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 submitted by a citizen against the competent entity for the denial of the 'access to the traceability of accesses to your occupational clinical history that uses the occupational risk prevention service, from the period from 20-08-2020 to 20-08-2021.

After analyzing the request, which is accompanied by a copy of the administrative file processed before the GAIP, and in accordance with the report of the Legal Counsel, the following report is issued:

Background

1. According to the file, on September 3, 2021, a citizen submitted a letter to the entity, requesting the following information:

> "the people and the sections that have accessed my occupational clinical history (...) that use the risk prevention service (...)".

The request for access to information refers to the period from August 20, 2020 to August 20, 2021.

2. The file contains a copy of the Resolution of the director of the Catalan Data Protection Authority, of the rights protection procedure (...), which the same person claiming against the entity would have urged, in relation with the exercise of the right of access to this person's occupational clinical history.

3. The file contains a copy of the letter dated December 1, 2021, from the competent entity, in which the applicant is informed that:

> "In response to your request for which you are requesting we inform you of the people who have accessed your occupational medical history and which gave rise to the rights protection procedure (...), we can inform you that, in the period of time requested, 20-08-2020 to 20-08-2021, no communication has been made to third parties outside the scope of the data controller."

4. On January 11, 2022, the applicant submits a complaint to the GAIP, in which he explains that he has asked the entity for information on the traceability of access to his occupational medical history, and indicates that Access to information has been denied.

The person making the claim accompanies the claim with a letter detailing that the entity "did not give me any information on the traceability of access to the request of September 3, 2021, for which I made a claim to the Catalan Data Protection Authority."

In this letter, addressed to the GAIP, the claimant requests the following:

"I demand ..., of the period from 08-20-2020 to 08-20-2021, the information I relate to continued traceability for each access to my occupational clinical history (...):

1. Dates of each access
2. Category of professionals who accessed it on each date
3. Reason for each access
4. Unit from which each access occurred
5. Center from where they made each access
6. Population from which they have made each access."

5. On January 18, 2022, the GAIP informs the entity of the claim submitted, and requests the issuance of a report, the complete file relating to the request for access to public information , and the identification of the third parties affected by the access that is claimed, if any.

6. The file contains a copy of the entity's report, addressed to the GAIP, together with the factual background and the complete file relating to the request for the right of access provided for in the protection regulations of data, related to the rights protection procedure (...).

7. On February 15, 2022, the GAIP requests this Authority to issue the report provided for in article 42.8 of Law 19/2014, of December 29, on transparency, access to public information and good government, in relation to the claim presented.

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 entity 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 request a report from 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 (Article 4.1 of Regulation (EU) 2016/679 of the European Parliament and of the Council, of April 27, regarding the

protection of natural persons with regard to the processing of personal data (hereafter, RGPD).

Therefore, any other limit or aspect that does not affect the personal data contained in the requested information is outside the scope of this report, as would be the case of the limit established in article 21.1.b) of the LTC, relating to the investigation or sanction of criminal, administrative or disciplinary infractions, the application of which could lead to the claimant's right of access being denied or restricted for the purposes of protecting the investigation .

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

According to the letter of claim to the GAIP, the claimant would have requested, on September 3, 2021, information relating to "the traceability of access to my medical history
labor (...) that uses the occupational risk prevention service, through the printed (...)."

The claimant explains, in the same letter addressed to the GAIP, that she would have made another request for the traceability of accesses to another medical history, in respect of which, according to the claimant, the entity I would have provided him with information. Regarding this other request, the claimant explains, in the letter she provides to the GAIP, that this access would have occurred "to another of my HCs".

We note that no further information is available on this other request to which the claimant mentions, which, according to her, would have been attended to.

In any case, and for the purposes of interest in this report, the claimant states that her request of September 3, 2021 would not have been attended to, and that she would not have received information about the traceability of the different accesses to the labor medical history. Therefore, in his complaint to the GAIP, he requests that:

> "I claim (...), from the period from 20-08-2020 to 20-08-2021, the information that I relate below for traceability for each access to my occupational clinical history (...):
>
> 1. Dates of each access
> 2. Category of professionals who accessed it on each date
> 3. Reason for each access
> 4. Unit from which each access occurred

5. Center from where they made each access
6. Population from which they have made each access."

In relation to point 2. "Category of professionals who have accessed on each date", and according to the same letter that is attached to the claim submitted to the GAIP, the claimant requests to know "Persons and if by law they cannot give me the people, then let me know the position or the category of the professionals who have access." .

Given the claim in these terms, it is necessary to start from the basis that the data protection regulations apply to the treatments that are carried out on any information about identified or identifiable natural persons (art. 4.1 RGPD).

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”.

Law 19/2014, of December 29, on transparency, access to public information and good governance (LTC), recognizes people's right of access to public information, understood as such "the information prepared by the Administration and that which it has in its possession 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 (LT) is pronounced in similar terms, in its articles 12 (right of access to public information) and 13 (public information).

The information relating to the tasks carried out by the entity's risk prevention service, in particular, the information related to the person making the claim and their occupational clinical history, the subject of the claim, is "public information" for the purposes of of article 2.b) of the LTC, subject to the access regime provided for in this regulation, which establishes, as a general criterion, that the right of access to public information can only be denied or restricted by the causes expressly established by law (article 20 et seq. LTC). Specifically, and with regard to information containing personal data, as would be the case, it will be necessary to assess whether or not the right to data protection of the affected persons would justify the limitation of the right of access to public information regulated in the LTC.

III

The claim refers to information from the claimant's occupational medical history which, according to the claimant, would have been the subject of treatment by the occupational risk prevention service of the requested entity.

In this regard, it is necessary to take into account article 22 of Law 31/1995, of November 8, on the prevention of occupational risks (LPRL):

"(...).

2. The surveillance and health control measures of the workers will be carried out always respecting the right to privacy and the dignity of the person of the worker and the confidentiality of all information related to his state of health.

(…).

4. The data relating to the health monitoring of workers may not be used for discriminatory purposes or to the detriment of the worker. Access to medical information of a personal nature will be limited to the medical staff and the health authorities that monitor the health of the workers, **without it being made available to the employer or other persons without the express consent of the worker.**

(…)."

For its part, article 37.3 of the Regulation of occupational risk prevention services, approved by Royal Decree 39/1997, of January 17 (RSPRL), provides the following, in relation to health surveillance and the content what the occupational medical history must have:

"3. The functions of surveillance and control of the health of the workers indicated in the paragraph e) of section 1 will be carried out by competent health personnel technique, training and accredited capacity according to current regulations and lo established in the following paragraphs:

a) The prevention services that carry out surveillance and health control functions of the workers must have a medical specialist in Labor Medicine or diploma in Business Medicine and a company ATS/DUE, without prejudice to the participation of other health professionals with technical competence, training and accredited capacity.

(…)

c) Health surveillance will be subject to specific protocols or other means existing with respect to the risk factors to which the worker is exposed. (…).

The health examinations will include, in any case, a clinical-labor history, in which in addition to the anamnesis data, clinical examination and biological control and studies complementary depending on the risks inherent in the work, one will be recorded detailed description of the job, the time of stay in the same, los risks detected in the analysis of working conditions, and prevention measures adopted."

As this Authority has agreed, both in the Rights Protection Resolution (...), related to the examined claim, and on other occasions (Opinions CNS 8/2019, CNS 53/2019, or CNS 48/2021), the person making the claim, from the outset, has the right of access to their own personal information, in the terms provided for in article 15.1 RGPD.

Specifically, this precept recognizes the right of the affected or interested person to request and obtain from the person in charge of the treatment a copy of their personal data subjected to treatment, including certain information about this treatment, such as, for the purposes that interested, the recipients to whom this data has been communicated or is expected to be communicated (art. 15.1.c) RGPD). In this sense, it is stated in the file that the entity would have communicated to the applicant, on December 1, 2021, that: "In response to your request for which you are applying, we are informing you of the people who have accessed your occupational medical history and which gave rise to the procedure of protection of rights (...), we can inform you that, in the requested time period, 20-08-2020 to 20-08-2021, no communication has been made to third-party recipients outside the scope of the data controller."

However, as this Authority has argued, it seems clear that the accesses of staff who provide services for the person in charge cannot be considered as "communication", given that this staff is part of the person in charge. For this reason, as stated in the Rights Protection Resolution, the accesses made by the entity's staff cannot be considered as information that is part of the right of access provided for in the data protection regulations (art. 15.1 .c) RGPD).

Without prejudice to this, given the terms of the claim presented to the GAIP, it is necessary to examine whether there is another way other than the exercise of the right of access of the interested party (art. 15 RGPD) that allows the sole bidders information on the traceability of access to the clinical history (log of accesses), and in what terms.

IV

Article 6 of the RGPD establishes that there must be a legal basis that legitimizes the treatment, either the consent of the affected person (section 1.a)), or any of the other legitimizing bases provided for , such as, that the treatment is necessary for the fulfillment of a legal obligation applicable to the person responsible for the treatment (section 1.c)).

As can be seen from article 6.3 of the RGPD and expressly included in article 8 of Organic Law 3/2018, of December 5 on the protection of personal data and guarantee of digital rights (LOPDGDD), the processing of data it can only be considered based on this legal basis of article 6.1.c) of the RGPD when this is established by a rule with the rank of law.

At the same time, according to article 86 of the RGPD: "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, body or entity in accordance with the Law of the Union or of the Member States that applies to them in order to reconcile public access to official documents with the right to the protection of personal data under this Regulation."

The information requested, regarding the traceability of accesses to the claimant's occupational medical history, would form part of the registration or control of accesses to the medical histories, available to the person in charge (the entity). This is public information for the purposes of the LTC and would therefore remain subject to the access regime provided for in this regulation, which establishes, as a general criterion, that the right of access to public information can only be denied or restricted for the reasons expressly established by law (article 20 et seq.).

In this sense, and in the case of information that includes personal data, it is necessary to apply the provisions of articles 23 and 24 of the LTC.

With regard to Article 23 regarding access to certain categories of data, including health data, it should be noted that although the labor medical history contains health data, it should be taken into account firstly that it is information relating to the applicant himself and, secondly, that the information requested does not include health data since it would be limited to information about the people who have accessed the medical history. Therefore, Article 23 of the LTC would not apply to the information requested.

On the other hand, it is necessary to take into account article 24 of the LTC, according to which:

> "1. Access to public information must be given if it is information directly related to the organization, operation or public activity of the Administration that contains merely identifying personal data unless, exceptionally, in the specific case it has to prevail over the protection of personal data or other constitutionally protected rights.
>
> 2. If it is other information that contains personal data not included in article 23, access to the information can be given, with the previous reasoned weighting of the public interest in the disclosure and the rights of the people affected. To carry out this weighting, the following circumstances must be taken into account, among others:
>
> a) The elapsed time.
> b) The purpose of access, especially if it has a historical, statistical purpose or scientific, and the guarantees offered.
> c) The fact that it is data relating to minors.
> d) The fact that it may affect the safety of people.
> (...)."

The information on the traceability of the accesses to the claimant's occupational clinical history includes a set of information that goes beyond what can be understood as merely identifying data related to the organization, operation or public activity of the person in charge of the treatment, in terms of article 24.1 LTC, and article 70.2 of Decree 8/2021, of February 9, on transparency and the right of access to public information (RLTC).

We refer, apart from the information on the identity and, where appropriate, the category or profile of the professionals of the entity who have accessed, to other information such as the date of access, the reason for each access, as well as the center and population from which they were produced.

Access to the requested information therefore requires a prior weighing between the public interest in the communication of the information and the rights of the affected persons (art. 24.2 LTC).

In accordance with article 18.2 of the LTC, the exercise of the right of access is not conditional on the concurrence of a personal interest, and is not subject to motivation nor does it require the invocation of any rule. However, the fact that the applicant expresses what is the purpose he is pursuing and ultimately the reasons for which he is interested in knowing the information, may be relevant when considering and deciding on the prevalence between his right to 'access and the right to data protection of the affected persons (professionals of the entity who would have accessed the clinical history claimant's employment).

In fact, the purpose is one of the weighting criteria indicated by the LTC itself (article 24.2. b) LTC).

Point out, in this regard, that the right of access to public information can legitimately respond to particular interests. Regarding this, article 22.1 of the LTC, in demanding that the limits applied to the right of access to public information be proportional to the object and purpose of protection, mentions the taking into consideration, in the application of these limits, of "the circumstances of each specific case, especially the concurrence of a superior public or private interest that justifies access to the information."

For its part, State Law 19/2013, of December 9, on transparency, access to public information and good governance, mentions taking into consideration the fact that the applicant justifies their request for information in the exercise of a right (article 15.3.b)).

It is worth saying that the claimant does not detail the reasons why she is requesting access to the traceability of access to her occupational clinical history, at least, given the information available. However, considering the context in which we find ourselves and the type of public information requested, it could infer that the intended purpose of the request for information on access to your occupational clinical history could respond, at the outset, to the desire to verify possible improper access in order, where appropriate, to exercise some action or claim related to this access

For weighting purposes, it should be borne in mind that, according to the aforementioned provisions of the labor regulations (LPRL, and RSPRL), the processing of information from the labor medical history is limited to certain professionals and for certain functions, such as taking certain measures related to a worker's health and work situation.

It should be borne in mind that article 14.1 of the LPRL recognizes the worker's right to information in preventive matters:

> "Workers have the right to effective protection in terms of safety and health at work.
>
> (…).
>
> **The rights of information,** consultation and participation, training in preventive matters, stoppage of activity in case of serious and imminent risk and surveillance of your state

of health, in the terms provided for in this Law, are part of the workers' right to effective protection in matters of safety and health at work."

And while it is true that this article does not specify the scope of the right to information, it should be remembered that article 22.4 of the LPRL, reproduced above, specifies the accesses that can occur to occupational clinical histories (medical personnel and health surveillance authorities) and conditions the rest of the communications that may occur to the express consent of the worker himself. It seems reasonable to conclude that if the regulations recognize the holder of the employment medical history this power of disposal, in the sense of being able to decide who will be able to access it, this same holder must be able to know not only the information about his health contained in it but also which accesses are there they produce

For weighting purposes, it should be borne in mind that the health examinations carried out in the area labor, and the subsequent assessments made by the competent bodies or authorities, may have an impact on the particular circumstances and needs of each worker, and on their working conditions (special needs of the worker, change of workplace, etc.).

Although the particular circumstances of the case at hand are unknown, it is clear that, in principle, if the claimant has been taken care of by the risk prevention services, it could be relevant for the claimant to check whether there has been improper access to your medical history employment, and whether this has had an impact on your personal situation. Therefore, the purpose of the access may be related to the defense of the interests of the claimant, holder of the occupational clinical history, in relation to his employment situation, a purpose that must be framed in the aforementioned occupational health regulations.

This may justify that the claimant has the right to know information about the accesses made to her occupational clinical history, as this may affect her personal and employment situation.

In addition, we remind you that data protection legislation imposes on the data controller the obligation to adopt the necessary technical and organizational measures to guarantee the security of the personal data processed, including protection against unauthorized or illegal processing lawful (arts. 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 (art. . 77 RGPD), as would be the case that there has been improper access to the data of their occupational clinical history. This, without prejudice to being able to take other legal actions that it deems appropriate.

In this context, it seems clear that, in order to take this or other legal actions for the defense of her rights and interests, the claimant must be able to access certain information about the accesses to her occupational clinical history.

On the other hand, from the perspective of data protection, it is necessary to take into account the tenth additional provision of the LOPDGDD:

"The responsible persons listed in article 77.1 of this organic law may communicate the personal data requested by subjects of private law when they have the

consent of those affected or **appreciate that the applicants have a legitimate interest** that prevails over the rights and interests of those affected in accordance with the provisions of article 6.1 f) of Regulation (EU) 2016/679".

In principle, the legal basis of article 6.1.f) RGPD does not apply when data processing is carried out for the fulfillment of a mission carried out in the public interest or in the exercise of public powers of the person in charge - as would be the case with the treatment of health data in the field of the entity-. However, the tenth additional provision of the LOPDGDD provides for authorization for communication based on the legitimate interest of third parties, in this case, the claimant herself.

In the case we are dealing with, this qualification would be based on the legitimate interest that generally needs to be recognized for the worker served, in this case, the claimant, which is a weighting element that would justify, in the terms indicated, from the perspective of data protection regulations, the claimant's access to said access register, to be able to check whether these accesses conform to the provisions of the studied legislation.

v

On the other hand, for the purposes of the necessary weighting, it is necessary to analyze the possible impact that access to the requested public information could have on the rights of the people affected (professionals of the entity who have accessed the claimant's occupational clinical history, whose data may appear in the access register for traceability purposes).

The data of these professionals are personal data protected by the principles and guarantees of data protection regulations. The data of the professionals who access the occupational clinical history can be not only identifying or employment data (identity, workplace, category or professional profile), but also information related to the access itself (date, time and place of access).

In the workplace, workers can make some private use of computer resources or work tools (a mobile phone, a computer, etc.) that the company makes available to them for the development of tasks and functions entrusted to them, in accordance with the usage policies established by each company. Regarding this private use, in general terms, workers can have a certain expectation of privacy.

However, beyond that, it does not seem that a worker can have the same expectations when using these same tools to access information from a third party (the patient), which they should only access to fulfill certain tasks that has been assigned in relation to the
assessment and prevention of occupational risks, in this case.

To this it should be added that, according to article 5 of the RGPD:

"1. The personal data will be:

(…).

f) processed in such a way as to guarantee an adequate security of personal data, including protection against unauthorized or illegal processing and against its loss, destruction or accidental damage, through the application of appropriate technical or organizational measures ("integrity and confidentiality").

2. The person responsible for the treatment will be responsible for complying with the provisions of section 1 and able to demonstrate it ("proactive responsibility").

In the context at hand, the traceability of access to clinical records is a necessary measure to ensure the protection of the information contained therein.

In addition, the person in charge must have informed (and trained) his workers about the correct management of occupational clinical histories (among others, the impossibility of carrying out unauthorized access and the consequences of non-compliance in this sense), among others, because this follows from article 22.2 LPRL, and from the aforementioned principles of data protection regulations.

In short, if we take into account that these workers must have prior information about the correct use of occupational clinical histories, and about the traceability of the accesses that occur to them, it does not seem that the expectation of privacy of the workers of the 'entity when they access and manage other people's information (expectations that they may have in other areas of their professional activity), may represent a determining counterweight in the aforementioned weighting.

Therefore, the right to data protection of the people who have accessed it would not justify the denial of access by the claimant to the access register to her own occupational clinical history, including the identity and position or category (or other data linked to the access such as the date, unit, center and population from which the access occurs, and the reason for the access) of the people who have made the accesses.

According to the information contained in the file, the claimant has requested to know the identity of the professionals who have accessed her clinical work history and, "if by law they cannot give me the people, then provide me with the position or the category (...).". However, to the extent that, as we have seen, it cannot be concluded that the law prevents access to the requested information, it would not be justified, from the point of view of the right to data protection, to facilitate only the charge or category

The **principle of** data minimization (Article 5.1.c) RGPD) requires that access be limited to the data strictly necessary to achieve the intended purpose. Knowing the identity and position or category of the professionals who access the occupational clinical history, from the perspective of the minimization principle, is proportionate, since the identification, only, of the access profiles, without this allowing to individualize which professionals have accessed to the HC, it might not be sufficient for the purposes of the stated purpose of detecting or verifying, where appropriate, an improper access to the clinical history (LPRL).

On the other hand, it would not be relevant to communicate other personal data, such as the ID number, contact details of these professionals or others that, in other words, the claimant does not ask for either.

Finally, it should be remembered that, according to article 31 of the LTC, if the request for public information may affect the rights or interests of third parties, identified or easily identifiable, they must be given a transfer of 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.

Therefore, in the case we are dealing with, it will be necessary to grant the hearing procedure to the people affected in relation to the record of access to the claimant's occupational clinical history, so that they can make allegations and it can be assessed, if applicable, the concurrence of any additional circumstance that must be taken into account for the purposes of weighting.

conclusion

The data protection regulations do not prevent the person making the claim from communicating the information they request, relating to access to their clinical work history, including the identity, position or category of the professionals who accessed it, as well as other information linked to the accesses produced (date and reason for each access, unit, center and population), in relation to the requested period.

Barcelona, March 3, 2022