IAI 5/2022

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 presented by a citizen against a public entity for the denial of access to a traceability report of access to your medical history during the previous two years

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 public entity for the denial of access to a report of traceability of accesses to your medical history during the previous two years.

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, a citizen would have submitted to the entity, a request for access to his data, signed on May 20, 2021.

The file sent to this Authority does not contain an intelligible copy of said request. Even so, it appears from the available information that the request refers to the traceability of accesses to the applicant's medical history that would have occurred in the period from June 1, 2020, until time of submitting the application.

2. The file contains a copy of the letter dated December 23, 2021 from the entity in which the applicant is informed that:

> "In response to your letter of complaint submitted through the Virtual Office of Procedures, where you referred to your request for traceability, we want to inform you that in the La Meva Salut application, you can view the traceability of the entity that has accessed its history."

3. On January 14, 2022, the applicant submits a claim to the GAIP, in which he states that:

> "In May 2021 I requested a traceability report of my clinical history from my head of reference (CAP ...). Until today I have not received a response, I made a complaint on the Catsalut page and they answered me a month and a half ago that I can find this information in the application of my health. This feature in the app hasn't worked for months and if it does, it doesn't give you the information I need because **I want to know who has looked at my medical records in the last two years.** The reason is that I have well-founded suspicions that there have been irregularities in the treatment of my history in this regard."

4. On January 25, 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.

5. According to the file, the claimant initially requested the mediation procedure, although on February 9, 2022, the claimant himself notified the GAIP of his withdrawal.

6. 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 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 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, relating to 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 complaint to the GAIP, submitted on January 14, 2022, the person making the claim would have requested from the entity, in May 2021, information relating to the traceability of the accesses made to its medical history during the last two years.

The person making the claim explains, in the letter of claim to the GAIP, that:

> "In May 2021 I requested a traceability report of my clinical history from my head of reference (CAP...). Until today I have not received a response, I made a complaint on the Catsalut page and they answered me a month and a half ago that I can find this information in the application of my health. This feature in the app hasn't worked for months and if it does, it doesn't give you the information I need because I want to know who has looked at my medical records in the last two years. The reason is that I have well-founded suspicions that there have been irregularities in the treatment of my history in this regard."

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 health care that the claimant receives from the public health network (specifically, from the services of the competent entity and the CAP that would have served the claimant), 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, it is 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 own medical history. Specifically, the claimant asks to know the information relating to "the people who have consulted my medical history in the last two years."

The clinical history includes the set of documents relating to the healthcare process of each patient, while identifying the doctors and other healthcare professionals who intervened (art. 9.1 of Law 21/2000, of December 29, on the rights of 'information concerning the patient's health and autonomy, and the clinical documentation (hereinafter Law 21/2000). The patient's clinical history contains the information relating to this assistance, and which is detailed in Article 10.1 of Law 21 /2000.

As this Authority has agreed (among others, in 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 information personal, in the terms provided for in article 15.1 RGPD.

For the purposes concerned, and given that the claimant requests to know the people who would have accessed their medical history, the RGPD recognizes the right of the affected or interested person to request and obtain from the data controller a copy of their personal data
subjected to treatment, including certain information about this treatment, such as, for the purposes that concern, the recipients to whom this data has been communicated or is expected to be communicated (art. 15.1.c) RGPD).

However, as this Authority has ruled, the accesses of staff who provide services for the person in charge (art. 4.7 RGPD), the entity in the case at hand, cannot be considered as "communication", given that this staff is part of the manager himself.

Thus, the accesses made by the care staff themselves or by other profiles (for example, administrative staff) of the entity 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).

Through the exercise of the right of access to personal data provided for in the data protection regulations (art. 15 RGPD), the claimant can access the identity of the recipients of the information who are not personnel of the entity responsible or someone in charge of its treatment. However, he would not be able to access other information included in the request regarding the accesses of people who are under the dependency of the responsible. It remains to be seen whether, in accordance with transparency legislation, he can have access to this information.

IV

Article 6 of the RGPD establishes that in order to carry out a treatment, such as the communication of data necessary to attend to an access request, it is necessary to have a legal basis that legitimizes the treatment, either the consent of the affected person (section 1.a)), whether it is one 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 clinical history, would form part of the registration or control of accesses to the clinical histories, available to the person in charge. 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 medical record contains health data, it is relative information to the claimant himself, owner of the medical history. On the other hand, the information requested does not include health data since it would be limited to information about the people who have accessed the claimant's medical history.

Therefore, given that article 23 of the LTC would not apply to the information requested, it will be 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 affected persons. 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 accesses to the claimant's clinical history covers 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 data controller , 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 applicable, the position, category or profile of the professionals of the entity who have accessed, to other information such as the date and place of access, or, where appropriate , the reason for accessing the medical history.

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 (the professionals who would have accessed the medical history of the person making the claim).

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, the LT mentions taking into consideration the fact that the applicant justifies their request for information in the exercise of a right (article 15.3.b)).

In the case at hand, the claimant explains the reason for his request, in the claim addressed to the GAIP, in the following terms:

"(...). The reason is that I have well-founded suspicions that there have been irregularities in the treatment of my history in this regard."

Thus, it is clear that the purported purpose responds in this case to the will of the owner of the medical record himself to verify possible improper access to, if this were the case, verify irregularities of which he has suspicions. This should allow you, if applicable, to exercise any action or claim related to this improper access or to the consequences this may have had for your interests and rights as a patient.

For weighting purposes, it must be borne in mind that the clinical history responds to several uses, the main one being the provision of adequate assistance to the patient.

According to Article 11 of Law 21/2000:

"1. The clinical history is an instrument primarily intended to help guarantee adequate assistance to the patient. For this purpose, the care professionals of the center who are involved in the diagnosis or treatment of the patient must have access to the clinical history.

2. Each center must establish the mechanism that makes it possible that, while assistance is provided to a specific patient, the professionals attending to him can, at all times, have access to the corresponding clinical history.

3. The clinical history can be accessed for epidemiological, research or teaching purposes, subject to the provisions of Organic Law 15/1999, of December 13, on the protection of personal data, and the Law of Estat14/1986, of April 25, general health, and the corresponding provisions. (...).

4. The staff who take care of the administration and management tasks of the health centers can access only the data of the clinical history related to said functions.

5. The personnel in the service of the Health Administration who perform inspection functions, duly accredited, can access the clinical histories, in order to check the quality of the assistance, the fulfillment of the patient's rights or any other obligation of the center in relation to patients or the Health Administration.

(...)."

Thus, from the outset, any patient may have a legitimate interest in knowing which accesses have occurred to their clinical history as a mechanism for the effectiveness of the rights recognized by health legislation.

This patient's right to information is configured in fairly broad terms (article 2 Law 21/2000 and art. 4 Law 41/2002), by establishing that the patient must be able to have all the information related to the different aspects that have an impact on the their treatment and therefore their health. According to article 2 of Law 21/2000:

"1. In any healthcare intervention, patients have the right to know all the information obtained about their own health. However, a person's wish not to be informed must be respected.

2. The information must be part of all care actions, it must be truthful, and it must be given in a way that is comprehensible and appropriate to the patient's needs and requirements, to help him make decisions about an autonomous way.

(...)."

This broad right to information would include, among others, knowing which professionals are in charge and have intervened in the healthcare process, that is to say, knowing which professionals attend to a patient and, by extension, it can be considered that it would include knowing which professionals have accessed the clinical history to carry out or participate in this care, or to perform the functions provided for in the patient autonomy legislation (administrative functions, access by the inspection services of the quality of assistance, etc.).

The legislation itself regulating the clinical history and the rights of the patient, limits the terms in which certain professionals can access the clinical histories of patients. Therefore, given that the clinical history is the main instrument for making decisions about the assistance that the patient receives, it is undeniable that checking whether improper access has occurred would be part of the legitimate interest that, as the owner of the clinical history belongs to the patient himself.

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).

Specifically in the area that concerns us, article 9.4 of Law 21/2000 provides the following:

"4. Health centers must take appropriate technical and organizational measures to protect the personal data collected and prevent their accidental destruction or loss, as well as unauthorized access, alteration, communication or any other processing ."

At the same time, the data protection regulations recognize the affected person the right to present a claim before, in this case, this Authority when it considers that there has been a breach or infringement of the data protection regulations that affects the processing of your personal data (art. 77 RGPD), as would be the case if there had been improper access to the data of your clinical work 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 his rights and interests, the claimant must be able to access certain information about the accesses to his medical history. Specifically, the claimant must be able to know which professionals have accessed their information, in order to be able to corroborate or not the suspicions of improper access, and to verify a possible irregularity with regard to the measures that the regulations require of the person in charge in relation to the management of the claimant's medical 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 the 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 an authorization for communication based on the legitimate interest of third parties, in this case, the claimant himself.

In the case we are dealing with, this qualification would be based on the legitimate interest that generally needs to be recognized for the patient treated - the claimant -, which is an element of weighting that would justify, in the terms indicated, from the perspective of the regulations of data protection, access to the register of accesses made to the own clinical history, to be able to check whether these accesses are in line with the provisions of the studied legislation and to check the suspicions of irregularities that the claimant makes explicit.

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 (the organization's professionals who have accessed the claimant's medical history, the data of which may be included 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 a patient's clinical history can be not only identifying or work data (identity, position,
category or professional profile), but also information relating to the access itself (date of access and center from which it occurred).

Workers (in this case, care professionals, or other profiles, of health services), can make a certain private use of computer resources or work tools, such as a mobile phone, a computer, etc., which 'company makes available to them for the development of the tasks and functions entrusted to them, in accordance with the use policies established by each company. Regarding this private use, in general terms, workers can have a certain expectation of privacy.

Now, beyond that, it doesn't seem like a worker can have the same expectations when
uses these same tools to access information of a third party (the patient), which should only be accessed to fulfill certain tasks assigned to it in relation to the provision of health care to the patient, 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").

It should be borne in mind that, according to the patient autonomy legislation, any access to clinical histories must necessarily be managed, documented and supervised by the person in charge (art. 11 Law 21/2000). The traceability of access to clinical records is a necessary measure to ensure the protection of the information contained therein. Therefore, it does not seem that the expectation of privacy that the affected workers could have in other parts of their professional activity is equally applicable when these workers access and manage other people's information (not only their own patient, but also data from other people, such as the patient's relatives or other professionals who care for him).

In short, if we take into account that the workers who may be affected by the claim submitted must have prior information about the correct use of clinical records and about the traceability of the accesses that occur, it does not seem that the expectation of privacy of these workers, when they access and manage other people's information (expectations that they may have in other areas of their professional activity), may be 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 his own clinical history, in particular, to know the identity of the professionals who they have accessed it.

In any case, we remember that 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, if applicable, the position, category or profile of the professionals who access the clinical history and other data linked to the access (date and time, place, reason, etc.), would result provided, as it allows to comply with the purpose stated by the claimant to know "the people who have consulted my medical history" and check, where appropriate, improper access by those he suspects. 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 request 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

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.

Therefore, in the case at hand it will be necessary to grant the hearing procedure to the people affected in relation to the registration of access to the claimant's medical history, so that they can allegations and can assess, where appropriate, the concurrence of some 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 the traceability of access to their medical history, in particular, knowing the identity of the people who have consulted their medical history during the period of two years requested.

Barcelona, March 3, 2022