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Autoritat Catalana de Protecció de Dades

Legal report issued at the request of the Commission for the Guarantee of the Right of Access to Public Information in relation to the claim of a citizen against a public entity in the field of health, for the denial of access to the report of traceability (access to your medical history), from January 2020 to January 2022

The Commission for Guaranteeing 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 a public entity in the area of health (hereafter, the entity), for the denial of access to information on the traceability report - that is, access to your medical history - for the period from January 2020 to January 2022.

The request, which is accompanied by a copy of the administrative file processed before the GAIP, has been analysed, and in accordance with the report of the Legal Counsel, the following report is issued.

Background

1. It is stated in the file that on January 17, 2022, the claimant submitted a request to exercise the right of access (traceability) to the entity, in relation to the accesses from January 2020 to January of 2022.

2. It is stated in the file that on November 7, 2022, the applicant would have submitted a claim to the GAIP, in which she sets out the following:

"That I have not received the requested information, since it does not include the identification of the worker included in my medical history. On the other hand, I have evidence that proves the intrusion into my history on 1/12/2021 and it is not reflected in this report. Which indicates to me that this traceability report is not complete.".

3. On November 18, 2022, the GAIP would have asked the claimant to specify the object of her claim, that is to say, what would be the information she would need to receive.

It is stated in the file that on November 29, 2022, the claimant would have provided the requested information to the GAIP, specifically, the "access table" to her medical history that she would have already received, as well as a copy of the letter of response from the CAP in which the claimant would have submitted the request for access to the traceability report, dated January 18, 2022.

4. The file contains a letter, dated August 12, 2022, in which the entity informs the claimant, in relation to her request of January 18, that once the traceability of the accesses to the HC, "there are 2 accesses to your clinical history that we have not been able to verify are linked to visits, actions or functions of professionals." And the dates on which these accesses would have occurred are indicated.

5. Likewise, the file contains a letter dated August 25, 2022, in which the entity's territorial management addresses the claimant with the following information: "Report by the management *team of the 'Basic Health Area ...; Summary table of the accesses made between the annuities you have requested; Accompanying letter from the management of the Primary Care Service ....”*

Therefore, according to the available information, the entity would have already sent him a list of the requested accesses that would include the name of the center, the date of access, the professional category ("nurse, administrative assistant, doctor of family and community, social worker", etc.), and the module ("new monitoring, change citation, user analytics, vaccinations of a user", etc.).

Thus, according to the information available, this information would have already been given to the claimant.

7. On December 5, 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.

8. On December 21, 2022, the entity sends the requested file and the corresponding report to the GAIP, in which, in summary, it states that the claim must be dismissed, "because the claim *of 'getting the identity of the professionals ... who have accessed their clinical history is not part of the right of access legally established in Catalonia, as it is not considered data communication, and therefore ... does not have the duty legal to inform about such identity on the occasion of an access request in the terms established in the LOPD (...).”*

9. On January 5, 2023, 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 included in the requested information is outside the scope of this report.

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

Consequently, this report is issued exclusively based on the aforementioned provisions of Law 32/2010, of October 1, of the Catalan Data Protection Authority and Law 19/2014, of 29 December, 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, presented on November 7, 2022, the person making the claim would have requested from the entity, in January 2022, information relating to the traceability of the accesses made to their medical history for a two-year period from January 2020 to January 2022).

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

" *"That I have not received the requested information, since it does not include the identification of the worker included in my medical history. On the other hand, I have evidence that proves the intrusion into my history on 1/12/2021 and it is not reflected in this report. Which tells me that this traceability report is not complete* ."

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 healthcare that the claimant receives from the public health network (specifically, from the entity's services and the CAP that would have served the claimant), is "public information" for the purposes 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 for the reasons 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 therefore refers to information on the traceability of accesses to the medical history of the holder of the information itself, that is to say, the patient.

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

As this Authority has agreed on several occasions (Opinions CNS 53/2019, CNS 48/2021, CNS 10/2022, or Reports IAI 4/2022 or IAI 5/2022, among others), the person claiming would have, entry, right of access regarding your own personal information, in the terms provided for in article 15.1 RGPD.

For the relevant purposes, it should be borne in mind that the claimant is asking to know the identity (*"the identification of the worker included in my medical history"),* beyond the information that the entity would have previously provided, and which would include , given the information available, the list of accesses with indication of the profile or area from which these accesses occur.

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 processing, including certain information about this processing, 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).

Now, as this Authority has also done in the past, it seems clear that it cannot be considered as "communication", the accesses of the personnel who provide services for the responsible person (in the case we are dealing with, the entity), given that this staff is part of the person in charge.

For this reason, access to the clinical history of a patient, in the case at hand, the claimant, carried out by the institution's staff, cannot be considered as information that is part of the right to access provided for in the data protection regulations (art. 15.1.c) RGPD).

However, 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 interested party's right of access to his own information (art. 15 RGPD), which allows applicants to be given information about the traceability of access to the clinical history (log of access), and under what terms.

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.).

The requested information includes personal data, and therefore it is necessary to apply the provisions of articles 23 and 24 of the LTC.

Article 23 would not be applicable to the case at hand, since, although the medical history includes health data, these refer to the patient himself, in this case, the claimant.

On the other hand , the information requested by the claimant does not include health data, given that it would be limited to information about the professionals who have accessed her medical history, specifically, her identity.

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 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 the access, especially if it has a historical, statistical or scientific purpose, 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 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 responsible for 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).

The information requested does not only refer to the identity and, where applicable, the position, category or profile of the professionals of the entity who have accessed your medical history, but also to other information such as the date and place of access, or, if applicable, the reason for accessing the clinical history (performance of analytics, follow-up, monitoring, etc...), that is, information on the purpose of the access. This, taking into account, in addition, the information that the entity would have already provided to the claimant.

Therefore, access to the requested information 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 their clinical history).

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

It must be reiterated that the right of access to public information can legitimately respond to particular interests. 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 higher public or private interest that justifies access to the information."*

The LT also 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, in the claim addressed to the GAIP, states that:

"(...) I have evidence that proves the intrusion into my history on 1/12/2021 and it is not reflected in this report. Which indicates to me that this traceability report is not complete.".

In addition, from the letter of August 12, 2022, which appears in the file, addressed by the organization to the claimant, it seems that he had already been informed that "there are 2 accesses to your medical history of which we have not been able to verify are linked to visits, actions or functions of professionals", and the dates of these two accesses are indicated.

Thus, based on the available information, it seems that the intended purpose may respond to the will of the holder of the medical record himself to check 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, quoted:

"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 care, 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 her rights and interests, the claimant must be able to access certain information about access to her medical history. In particular, you must be able to know which professionals have accessed your 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, of the person making the claim.

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 being 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 clinical history itself, to be able to check whether these accesses conform to the provisions of the studied legislation and to check the suspicions of irregularities that the claimant would point out (remember that , on the one hand, the claimant points to accesses that according to her would have occurred and that would not be included in the information initially received, and that in the letter of August 18 addressed to the claimant, cited, reference is made to two accesses for which the entity could not have ascertained the reason).

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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 affected persons (the professionals of the entity who have accessed the medical history of the claimant, 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. This data can be not only identification or work data (identity, position, category or professional profile), but also information related to the access to the clinical history itself (date of access and center from where it occurred).

The staff (in this case, care professionals, or other profiles, of the health services), can make some 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.

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 assigned in relation to the provision of healthcare to the patient, in this case.

According to article 5 of the RGPD, the data must be:

> *" 1 . (...).*
>
> *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").*

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 therefore a necessary measure to ensure the protection of the information contained therein.

Therefore, for the purposes of interest, it does not seem that the expectation of privacy that the affected staff could have in other parts of their professional activity, is applicable to the same extent when these workers access and manage other people's information (not only the patient's own, but also other people's data, such as the patient's relatives or other professionals who care for him).

In short, if we take into account that the staff affected by the claim presented must have prior information about the correct use of the clinical records and about the traceability of the accesses that occur, it does not seem that their expectation of privacy , when accessing and managing other people's information (expectations that this same staff may have in other parts of the 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 claimant's denial of access to the record of access to her own clinical history, in particular, knowing the identity of the professionals who have accessed it, which is what he specifically asks for in the claim submitted to the GAIP.

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.

Know 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.) - information that the claimant would already have according to it follows from the available information-, it would be provided, since it allows compliance with the purpose made explicit by the claimant to know the identification of the people who have consulted the medical history and to check, where appropriate, the relevance of the accesses. 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.

It is important to remember that, as provided in 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 transferred from the sole· legality, so that they can make the allegations they consider appropriate, in those cases in which 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 medical history, so that they can make allegations and it can be assessed, if case, 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 access to their clinical history, including the identity of the professionals who accessed it, in relation to the requested period.

Barcelona, February 24, 2023