

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 against the denial of the request for access to the reports issued by a primary care center relating to five residences and information related to residents

The Commission for the Guarantee of the Right to Access to Public Information (GAIP) asks the Catalan Data Protection Authority (APDCAT) to issue a report on the claim submitted in relation to the denial of the access request to the reports issued by a primary care center relating to five residences and information relating to the residents.

Having analyzed 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 Adviser, I issue the following report:

Background

1. On February 16, 2023, a person wrote to the department responsible for health in which he requested access "*[...] to the 5 residences specified at the end:*

1. Copy of all reports drawn up by the CAP [...] and/or Public Health Service from 03/15/2020 to 04/30/2020.

2. Number of total official deaths of residents for EACH RESIDENCE, making two breakdowns for each as well:

a) confirmed / suspected cases

b) deaths in one's own residence / referred to hospitals / others (group here family home or other locations)

Residences for which details are requested, all in [...]:

- 1. [...]*
- 2. [...]*
- 3. [...]*
- 4. [...]*
- 5. [...]"*

The applicant states in the subject field of the application "*Detail first wave in residences of [...]*". According to the submitted file, the person is referring to the first wave of COVID-19.

2. On March 30, 2023, the Department decides to partially approve the applicant's request. The resolution is notified to the applicant on April 8, 2023.

In particular, the Department denies the applicant access to the CAP reports [...] on the understanding that "*[...] they contain information that would indirectly allow the disclosure of residents' personal data, since in multiple cases, despite an attempt to anonymize the*

information, individual clinical information is presented for many people, and not a general assessment of the health situation of said residences. Considering that each care center may have a sufficiently small number of residents, the transmission of detailed patient information would involve too high a risk of attribution of this information to specific individuals.

Thus, sending reports that do not present a general assessment of the residence's situation, but rather detailed information on each patient may violate the statistical secrecy that this Administration is obliged to keep".

In short, the Department bases the denial of access to the reports on the understanding that it is necessary to protect the personal and family privacy of the patients, the confidentiality of all information related to their healthcare process and, regarding the data protection regime, in be public information that contains specially protected personal data, the access to which does not appear to have been expressly consented to by the affected persons.

3. On April 11, 2023, the applicant submits a claim to the GAIP in which he requests access to the "CAP reports [...] on 5 residences of [...]", and he explains that the Department has only given him the reports for three of the five residences he requested and, likewise, not all the reports issued in the requested period are there.

4. On April 17, 2023, the GAIP sends the claim to the Department and requests a report setting out the factual background and the foundations of its position in relation to the claim, as well as the complete file and, where appropriate, that specify the third parties affected by the claimed access.

5. On April 19, 2023, the Department issues a report in which, in short, it reiterates the same grounds for which it partially assessed the request for access made by the person making the claim.

6. On April 28, 2023, the GAIP requests a report from this Authority, in accordance with the provisions of article 42.8 of Law 19/2014, of December 29, on transparency, access to public information and good governance.

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 complaints against resolutions regarding 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, understood as any information about an identified or identifiable natural person, directly or indirectly, in particular through an identifier, such as a name, an identification number, location data, an online identifier or one or more elements of physical, physiological, genetic, psychological, economic, cultural or social security of this person (art. 4.1 of Regulation 2016/679, of April 27, 2016, relating to the protection of natural persons with regard to the processing of personal data and the free circulation of such data and by which Directive 95/46/CE (General Data Protection Regulation, hereafter RGPD) is repealed.

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.

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

The data protection regulations, in accordance with what is established in articles 2.1 and 4.1) of the RGPD, apply to the treatments that are carried out on any information " *on an identified or identifiable natural person ("the interested party »); Any person whose identity can be determined, directly or indirectly, in particular by means of an identifier, such as a number, an identification number, location data, an online identifier or one or more elements of identity, shall be considered an identifiable physical person physical, physiological, genetic, psychological, economic, cultural or social of said person "*.

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* .

In accordance with the provisions of article 5.1.a), any processing of personal data must be lawful, loyal and transparent in relation to the interested party and, in this sense, the RGPD establishes the need to participate in some of the legal bases of article 6.1, among which section c) provides for the assumption that the treatment " *is necessary for the fulfillment of a legal obligation applicable to the person responsible for the treatment "*.

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 can only be considered based on these legal bases of article 6.1. c) and e) of the RGPD when so established by a rule with the rank of law.

For its part, article 86 of the RGPD provides that " *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 , organism or entity in accordance with the Law of the Union or of the Member States that applies to them in order to reconcile the public's access to official documents with the right to the protection of personal data under this Regulation .*

Public access to documents held by public authorities or public bodies is regulated in our legal system in Law 19/2014, of December 29, on transparency, access to public information and good governance (hereinafter, LTC) , which 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 power as a result of its activity or the "exercise of his 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 (hereafter, LT), is pronounced in similar terms, in its articles 12 (right of access to public information) and 13 (public information).

In the case at hand, in which access is requested to a copy of certain reports issued by a primary care center or the public health service in relation to five residences and to information relating to the number of deaths of residents, this information must be considered public for the purposes of article 2.b) of the LTC, and subject to the right of access (article 18 of the LTC), as it is documentation in their possession as a consequence of their activity.

It must be noted, however, that the right of access to public information is not absolute and can be denied or restricted for the reasons expressly established in the laws, as is the case of the limits of articles 23 and 24 of the LTC by what about personal data.

III

The request to the Department initially referred to access, regarding the period between March 15, 2020 and April 30, 2020, on the one hand, to a copy of the reports issued by a primary care center (CAP) and by the public health service in respect of five residences, and on the other, to information on the number of deaths of residents of each residence, in particular, broken down in terms of confirmed cases or suspected cases (it is understood that of COVID-19), and if the deaths occurred in the residences, in the hospitals to which the residents were referred or among other circumstances, such as at the family home.

However, in the claim submitted to the GAIP, the applicant only refers to the failure to deliver the reports issued by the CAP. In particular, the person making the claim points out that the Department has only delivered the "*[...] reports on 3 of the 5 residences requested. On the other hand, I am not given all the reports within the requested period*".

According to what appears from the file sent, the Department partially estimated the request for access regarding the information relating to the number of deaths of residents of the five residences referred to by the person making the claim, but he did not give access to a copy of all the CAP reports basing his decision on the fact that the reports contain information that would allow the affected residents to be identified, so that access would affect their personal and family privacy, the confidentiality of information related to your care process and, in addition, it would lead to the disclosure of specially protected data.

For everything that has been explained, the object of the analysis of this report will cover only the documentation that the claimant refers to in the claim presented to the GAIP, that is, the reports issued by the CAP between the dates 15 of March 2020 and 30 April 2020, in relation to the two remaining residences. However, it is worth saying that from the perspective of the data protection regulations, the conclusions reached in this report are equally applicable to any of the reports referred to by the person claiming in his sole initial application to the Department.

Once it has been established what the object of the claim is, in advance it is necessary to refer to the fact that it cannot be ruled out that among the information affected by the access request there may be data relating to deceased persons.

It should be noted that, on the basis of Recital 27 of the GDPR, the GDPR does not apply to the protection of personal data of deceased persons. In this sense, article 2.2.b) of the LOPDGDD establishes that this organic law will not apply to the processing of data of deceased persons, without prejudice to what is established in article 3, which broadly recognizes, the right of access, rectification and deletion to persons related to the deceased, provided that the deceased person has not expressly prohibited it or so established by law.

Therefore, and without prejudice to the fact that the right to privacy (provided in Article 18.1 EC) may extend beyond the death of a person, in the terms recognized by Organic Law 1/1982, of 5 May, of Civil Protection of the right to honor, to personal and family privacy and to one's own image (arts. 4 to 6), the protection provided by the data protection regulations expires with the death of the person.

And, consequently, without prejudice to the provisions of article 3 of the LOPDGDD, access to information relating to deceased persons would not be contrary to the RGPD and the LOPDGDD, given that they would not be within the scope application of this regulation.

Outside of these cases, the claim of access to the reports issued by the primary care center in which personal data is affected, in the terms of article 4.1 of the RGPD, must be analyzed from the perspective of the limits of Article 23 and 24 of the LTC.

At the outset, it must be acknowledged that the specific scope of the information contained in the reports whose copy is sought to be accessed is unknown. Now, taking into consideration that these are the reports issued by the CAP relating to five residences, during the period of the first wave of COVID-19 (specifically, between the period from March 15 to April 30, 2020), and based on the grounds adduced by the Department to partially estimate the access request, it seems clear that at least the access request affects two categories of people. We refer, on the one hand, to the professionals of the primary care center who issued the reports and, on the other hand, to the residents.

However, we cannot rule out the possibility that other categories of people have been affected, such as other CAP professionals or the staff of the residences who are affected by the request for access due to the exercise of their functions, or relatives of the residents.

Access to the data of professionals, which are affected by the request for access due to their functions, must be analyzed from the point of view of what is provided for in article 24.1 of the LTC, that is, " *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 the protection of personal data or other constitutionally protected rights must prevail".

For this purpose, it is necessary to take into account article 70.2 of Decree 8/2021, of February 9, on transparency and the right of access to public information (RLTC), which provides for the following:

"For the purposes of what is provided for in article 24.1 of Law 19/2014, of December 29, personal data consisting of the name and surname, the position or position held, body and scale, the functions performed and the telephone and addresses, postal and electronic, of professional contact, referring to staff in the service of public administrations, senior positions and managerial staff in the public sector of public administrations.

In cases where the publication or access to an administrative document requires the identification of the author, the location data, the number of the national identity document or equivalent document must be removed in particular and the handwritten signature. If the signature is electronic, the electronically signed document must be published in such a way that the properties of the electronic certificate used for the signature cannot be accessed.

identifying data of the author in his position of position or staff in the service of public administrations".

Thus, to the extent that the documentation affected by the request contains merely identifying data (name and surname and position) of the personnel who have intervened in the exercise of their duties, either for having issued any of the reports, or because the reports refer to personnel in the exercise of their functions, the access of the person claiming to this data must be estimated on the basis of article 24.1 of the LTC, unless some exceptional circumstance in the affected person.

VI

As for resident people, as can be seen from the information contained in the file sent, the access request affects categories of specially protected data referred to in article 23 of the LTC, in particular their health data. In accordance with what has been set out above, it cannot be ruled out that these categories of data may be affected with respect to other people, such as the relatives of the residents or the staff of the residences and, even, from the primary care center itself.

Article 23 of the LTC provides the following:

"Requests for access to public information must be denied if the information sought contains particularly protected personal data, such as those relating to ideology, trade union affiliation, religion, beliefs, racial origin, health and sexual life, and also those relating to the commission of criminal or administrative offenses that do not entail a public reprimand to the offender, unless the affected party expressly consents by means of a written which must accompany the application".

Thus, to the extent that the documentation to which access is sought includes categories of personal data referred to in article 23 of the LTC, access should be limited .

However, it is necessary to take into account the provision of article 25.1 of the LTC, which states that *"If any of the limits of access to public information established by the previous articles are applicable, the denial of access only affects the corresponding part of the documentation, and restricted access to the rest of the data must be authorized"*.

To this end, given that in the case at hand the claimant requests access to a copy of the reports issued by the primary care center, from the perspective of data protection regulations, the anonymization of the reports would allow achieving the purpose of transparency through restricted access to the rest of the information not affected by the limit of article 23 of the LTC.

In relation to this issue, article 70.6 of the RLTC defines the mechanism of anonymization as *"the elimination of the personal data of the natural persons affected contained in the information and any other information that may allow them to be identified directly or indirectly without disproportionate efforts, without prejudice to being able to maintain, where appropriate, the merely identifying data of the positions or personnel in the service of the public administrations that dictate or intervene in the administrative act."*

However, in the event that the anonymization mechanism is not effective so that it is still possible to identify the affected persons without disproportionate efforts, it is necessary to take into account the obvious public interest of the information requested, to the extent that through its access, the person claiming, and in general the public, can evaluate the management of both the primary care center and the residences referred to in their application during the first wave of COVID-19, for example, to verify whether the security measures and the procedures for detection and management of the cases regulated in the current regulations were executed, or other instructions or documents issued by the health authorities.

For this reason, it would be justified to provide the person making the claim with, at least, some information about the action and management carried out by the primary care center and the residences in the context of the first wave of COVID-19. And, in particular, it could be facilitated by analogously applying the solution provided for in article 68.4 of the RLTC, that is to say *"[...] In the event that the content of the report may reveal information affected by the limit, the the need for publication of the report is understood to be satisfied by the publication of an extract or summary of the content in such a way as not to reveal the information affected by the limit"*.

Thus, it is considered that the person claiming must be provided with a summary of the reports issued by the CAP relating to the residences, ensuring that this summary does not contain the data affected by the limit of Article 23 of the LTC or any other information which, alone or in connection with other information that can be accessed, the claimant may end up identifying the affected persons.

conclusion

The data protection regulations do not prevent access to the merely identifying data of the professionals who have drawn up the reports, or appear in the documentation requested for the purpose of carrying out their duties.

However, in accordance with the principles that have been set out, with respect to information relating to specially protected categories of data, in particular data relating to the health of residents, access must be facilitated through 'an extract or summary of the reports issued by the primary care center, so that the physical persons affected are not identifiable.

Barcelona, May 18, 2023

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