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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 against the denial by a public entity of the request for access to the history access register clinic

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 in relation to the claim against the denial of a public entity to the request for access to the record of access to the clinical history.

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 January 28, 2023, a person submits a request to the entity in which he requests *"[...] information about the persons who have accessed my medical history and any personal document in this institution, where is it requested that it be shown who has accessed each of these documents where my person appears" […]* under the *"[…] protection of article 18 of Law 19/2014, of December 29, on transparency, access to public information and good governance, in relation to what is provided for in article 105 b) EC."*

The applicant specifies that *"[…] this includes all the health and non-health personnel who have accessed my clinical history, that is, administrators, secretaries, computer scientists, systems managers, etc. either explicitly when making notes or adjustments in the system that manage clinical histories, as well as implicitly or through conversations and/or internal management that may have been carried out on my personal data, access to the system, etc. ."*

Requests, in particular, that at least *"[…] their names and surnames, together with their rank and professional category be provided."*

2. On March 29, 2023, the entity replied to the applicant that *" all the accesses that have performed from _ different health centers with ownership of […] have been with a purpose care and, therefore , they are justified ".*

In accordance with what appears in the file sent, the entity attaches to its letter a database with the accesses, which includes the origin of the access, module, date and time of access, professional category and center name. Please note that this database does not contain identification data of the personnel who have accessed the information.

3. On April 3, 2023, the applicant submits a claim to the GAIP in which he reiterates the terms of his application and explains that the director of the primary care center confirmed to him that she would facilitate this information, but at the date of the claim it has still been transferred to him.

4. On April 12, 2023, the GAIP sends the claim to the entity, and requests a report setting out the factual background and the basis for its position in relation to the claim, as well as the complete file and, if where applicable, specifying the third parties affected by the claimed access.

5. On May 5, 2023, the entity sends a report to the GAIP in which it defends the inadmissibility of the claimant's claim on the understanding that it is not a request for public information but a request request for rights in accordance with the data protection regulations and, in this sense, defends that the person making the claim should have made a claim before the Catalan Data Protection Authority, being the competent authority for the matter.

The entity attaches to its report the list of people affected by the claim.

6. On June 21, 2023, the GAIP gives a transfer to the third parties affected by the claim so that within ten days, if applicable, they present allegations or the documents they deem appropriate in defense of their rights or interests.

According to what appears in the file, and on different dates, some of these people have defended in writing that the access to the administrative and clinical data of the claimant was carried out in the exercise of their functions.

7. On July 12, 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 government

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 claimant, on January 28, 2023, requested from the entity access to information relating to the traceability of the accesses made to his medical history, basing his request on the provision of article 18 of the LTC. This request is replicated in the claim presented to the GAIP on April 3, 2023.

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* .

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 entity that would have served the claimant), is "public information" for the purposes of the 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 the laws (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 person making the claim.

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 patient's health and autonomy, and clinical documentation). The patient's medical history contains the information relating to this assistance, which is detailed in article 10.1 of the 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, IAI 5/2022 or IAI 3/2023, among others), the the person making the claim would, from the outset, have the right of access to their own personal information, in the terms provided for in article 15.1 RGPD.

For the relevant purposes, and given that the claimant requests the traceability of access to his clinical history, and in relation to these, at least, requests the identity of the professionals, the professional rank and category, 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 of interest, 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 recent years, it seems clear that the accesses of the personnel who provide services for the person in charge (in the case at hand, the entity) cannot be considered as "communication", since that this staff is part of the manager himself.

For this reason, the accesses to the clinical history of a patient, in the case at hand, the person making the claim, carried out by the staff of the entity, cannot be considered as information that is part of the right to 'access foreseen 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

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* .

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.

The claimant requests the traceability of access to his medical history, and specifies that *" all the information available according to the law" be provided valid , although minimum we expect the names and names of the same , along with his rank and professional category ".*

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 accesses, and in particular, 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 the protection of personal data or other constitutionally protected rights must prevail.

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 medical 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 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 information on the identity, rank and professional category of the entity's professionals who have accessed, to other information such as the accesses that have occurred, their date and place 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 their clinical history).

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

It is worth saying that the claimant does not detail the reasons why he requests access to the traceability of access to his medical history, at least, given the information available. Now, taking into account the context in which we find ourselves and the type of public information requested, it could be inferred that the intended purpose of the request for information on access to your medical history, could answer, at the outset, to the will to check possible improper accesses in order, where appropriate, to exercise some action or claim related to this access.

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, at 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), 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 needs and requirements of the patient, 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 undertake this or other legal actions for the defense of their rights and interests, the claimant must be able to access certain information about access to their 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, 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 - the person making the claim -, given that it is an element of weighting that would justify, in the terms indicated, from the perspective of the data protection regulations, access to the register of accesses made to the clinical history itself, to be able to check whether these accesses are in line with the provisions of the studied legislation and check the suspicions of irregularities that the claimant makes explicit.

v

On the other hand, for the purposes of the weighting of article 24.2 of the LTC, it is necessary to analyze the possible impact that access to the requested public information could have on the rights of the affected persons (professionals who have accessed in the claimant's medical 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 a patient's clinical history can be not only identification or work data (identity, position, category or professional profile), but also information related to the access itself (date of access and center from 'where it occurred).

Workers (in this case, care professionals, or other profiles, of health services), can make some private use of computer resources or work tools, such as a mobile phone, a computer, etc., which the company makes these available for the development of the 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 assigned in relation to the provision of healthcare 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.

In addition, in the case at hand, it also does not seem that the professionals have any expectation of privacy to the extent that, by virtue of what is provided for in article 31 of the LTC, the GAIP has communicated to third parties (professionals) to whom the entity has identified as affected by the claim presented, so that within ten days they can present the allegations or documents they deem appropriate for the defense of their rights or interests, and third parties who have responded to this communication have only done so by agreeing that the access they carried out to the claimant's medical history had as its purpose the exercise of their work duties.

Therefore, the right to data protection of the people who have accessed it would not justify the denial of access by the person claiming access to their own clinical history, in particular, to know the identity of professionals who have accessed it, rank and professional category.

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 be provided, since it allows checking, if applicable, improper access of those you suspect. 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.

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, rank and professional category, who have accessed it.

Barcelona, July 28, 2023