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RESOLUTION of the procedure for the protection of the right of opposition no. PT 27/2018, petition against the Department of Health (Catalan Health Service) of the Administration of the Generalitat

#### Background

1.- On 06/01/2018, the Catalan Data Protection Authority received a letter from Mrs. access to his shared clinical history in Catalonia (henceforth, HC3), which he had previously exercised before the Department of Health of the Administration of the Generalitat. The claimant provided various documentation relating to the exercise of these rights.

Subsequently, on 04/12/2018, the Authority received a second letter from the same person, in which he reiterated his claim against the Department of Health for the alleged neglect of the right of access to his HC3, specifying their interest in accessing information regarding the identity of the people who were there accessed, as well as the information they had consulted.

The claim related to the neglect of opposition and access rights resulted in the opening of rights protection procedure no. PT 27/2018. [Given the diversity of rights that are the subject of a claim, it has been considered appropriate to issue two resolutions: the present resolution (PT 27/2018) has as its object the presumed neglect of the right of opposition; and simultaneously another resolution is issued (PT 27bis/2018), which has as its object the alleged neglect of the right of access.]

With regard to the exercise of the right of opposition and which is analyzed here, the claimant pointed out that he formulated the opposition request by certified mail sent on 11/27/2017 to the Secretariat of the Department of Health, and that subsequently, during the month of February 2018, and at the request of the Department itself, it reiterated its opposition request, without obtaining, however, any response.

2.- In accordance with article 117 of Royal Decree 1720/2007, of December 21, which approves the Regulation implementing Organic Law 15/1999, of December 13, on data protection of personal nature (hereafter, RLOPD and LOPD, respectively), by means of official notice dated 06/06/2018 the claim was transferred to the claimed entity, so that within 15 days it formulated the delegations that you consider relevant.

With regard to the entity to which the claim was transferred, it should be noted that, although the General Secretariat of the Department of Health is the body responsible for the file "Register of health information of patients", where they are collected the personal data that are incorporated into the HC3, through Resolution SLT/2376/2015, of September 17, the Department of Health delegated to the Catalan Health Service (hereinafter, CatSalut) the taking into consideration, the management and attention to requests to exercise the rights of access, rectification, cancellation and opposition by citizens in relation to the data contained in the HC3. That is why the claim was transferred to CatSalut.

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3.- Given the lack of allegations from CatSalut, and considering that it was necessary to have its opinion, on 1/10/2018 the Authority will reiterate the transfer of the claim. In this regard, on 3/10/2018 CatSalut stated that it would not make any allegation.

Despite this answer, given that once the complaint was analyzed it became evident that in order to resolve it it was essential that the entity complained of expressed its opinion on the origin - or not - of the opposition requested by the person claimant, on 11/30/2018 the Authority reiterated the request for information.

In particular, it was considered necessary for the optional staff who attend to the person making the claim to state in writing whether, from a medical or healthcare point of view, and once the reasons put forward by the person requesting the opposition have been assessed, it would be possible that when accessing the claimant's HC3, it was not possible to access or there was no information in the "clinical reports", "diagnostics" and "agenda" sections, regarding the reason for the medical visits carried out by the claimant person

On the date on which this resolution is issued, however, no statement of objections has been received from CatSalut.

#### Fundamentals of Law

1.- The Director of the Catalan Data Protection Authority is competent to resolve this procedure, in accordance with articles 5.b) and 8.2.b) of Law 32/2010, of October 1, of the Catalan Data Protection Authority.

2.- At the time when this resolution is issued, Regulation (EU) 2016/679 of the European Parliament and of the Council, of 27/4, relating to the protection of natural persons with regard to the treatment of personal data and the free circulation thereof (RGPD). However, this resolution is issued in accordance with the provisions of the LOPD and the RLOPD, as these are the rules applicable at the time (before 05/25/2018) when the right of opposition had been exercised here it is object of claim.

3.- Article 6.4 of the LOPD regulated the right of opposition as follows:

"4. In cases where the consent of the affected person is not necessary for the processing of personal data, and as long as a law does not provide otherwise, the latter may object to its processing when there are reasonable and legitimate reasons for this to a specific personal situation. In this case, the person in charge of the file must exclude the data relating to the affected person from the processing."

Also, the regulation of the right of opposition and its exercise was completed with articles 34 and 35 of the RLOPD, in which the following is determined:

"Article 34. Right of opposition

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The right of opposition is the right of the affected person so that the processing of their personal data is not carried out or that this processing ceases in the following cases:

- a) When your consent is not necessary for the treatment, as a result of there being a legitimate and well-founded reason, referring to your specific personal situation, that justifies it, provided that a law does not provide otherwise.
- b) When it comes to files whose purpose is to carry out advertising and commercial prospecting activities, in the terms provided for in article 51 of this Regulation, regardless of the company responsible for their creation.
- c) When the purpose of the treatment is the adoption of a decision referring to the affected person and based solely on an automated treatment of their personal data, in the terms provided for in article 36 of this Regulation.

#### Article 35. Exercise of the right of opposition

1. The right of opposition must be exercised through a request addressed to the data controller.

When the opposition is made based on letter a) of the previous article, the request must state the well-founded and legitimate reasons, relating to a specific personal situation of the affected person, which justify the exercise of this right.

2. The person in charge of the file must decide on the opposition request within a maximum period of ten days from the receipt of the request. After the deadline has passed without an express response to the request, the interested party can file the claim provided for in article 18 of Organic Law 15/1999, of December 13.

In the event that it does not have the personal data of those affected, it must also notify them within the same period.

3. The person responsible for the file or treatment must exclude from the treatment the data relating to the affected person who exercises his right of opposition or deny the interested party's request with reasons within the period provided for in section 2 d 'this article."

On the other hand, article 18 of the LOPD, referring to the protection of the rights of access, rectification, opposition and cancellation, established in its sections 1 and 2 the following:

- "1. Actions contrary to the provisions of this Law may be the subject of a claim by the interested parties before the Data Protection Agency, in the manner determined by regulation.
2. The interested party who is denied, in whole or in part, the exercise of the rights of opposition, access, rectification or cancellation, may bring this to the attention of the Data Protection Agency or, where applicable, of the competent body of each autonomous community, which must make sure of the validity or inadmissibility of the refusal."

In line with the above, article 16.1 of Law 32/2010, of the Catalan Data Protection Authority, provides the following:

- "1. Interested persons who are denied, in part or in full, the exercise of their rights of access, rectification, cancellation or opposition, or who may

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understand that their request has been rejected due to the fact that it has not been resolved within the established period, they can submit a claim to the Catalan Data Protection Authority."

3.- Having explained the applicable regulatory framework, it is then necessary to analyze whether the claimed entity resolved and notified, within the period provided for by the applicable regulations, the right of opposition exercised by the person making the claim, since precisely the reason for the complaint of the person who initiated the present procedure for the protection of rights was the fact of not having obtained a response within the period provided for the purpose.

In this regard, it is certified that the person making the claim here sent on 11/27/2017 by certified mail a letter dated 11/18/2017 addressed to the General Secretary of Health, through which he exercised his right of opposition to the publication of your health data in the HC3.

With regard to the determination of the entity obliged to respond to the opposition request made by the now claimant, it should be noted that, although the General Secretariat of the Department of Health is the body responsible for the file " Register of patients' health information", where the personal data that are included in the HC3 are collected, through Resolution SLT/2376/2015, of September 17, the Department of Health delegated the taking into consideration to CatSalut, the management and attention of requests to exercise the rights of access, rectification, cancellation and opposition by citizens in relation to the data contained in the HC3. Therefore, CatSalut is the one that had to answer the opposition request made by the claimant here. And in accordance with article 35 of the RLOPD, CatSalut had to resolve and notify the opposition request within a maximum period of ten days from the date of receipt of the request.

In relation to the question of the term, it should be borne in mind that in accordance with article 21.3 b) of Law 39/2015, of October 1, on the common administrative procedure of public administrations (hereinafter, LPAC) and article 41.7 of Law 26/2010, of August 3, on the legal regime and procedure of the public administrations of Catalonia (hereafter, LRJPCat), on the one hand, the calculation of the maximum term in initiated procedures at the request of a party - as is the case - it starts from the date on which the request was entered in the register of the competent body for its processing. And on the other hand, that the maximum term is for resolving and notifying (article 21 of the LPAC), so that before the end of this term the resolution must have been notified, or at least have occurred the duly accredited notification attempt (art. 40.4 LPAC).

Well, CatSalut has not proven to have responded, neither within the ten-day period provided for that purpose, nor subsequently, to the opposition request made by the now claimant.

Consequently, the assessment of the claim proceeds, which was based on the lack of response to the request to exercise the right of opposition. This notwithstanding what will be said below regarding the substance of the claim.

4.- Regarding the origin of the claim in terms of substance, it should be taken into account that articles 6.4 of the LOPD and 34 of the RLOPD regulated the right of opposition as the right of the affected person to avoid the processing of your personal data or its termination in certain cases, unless there is a law that provides otherwise.

The consequence that follows from articles 6.4 of the LOPD and 34 of the RLOPD, is the obligation of the person who exercises his right of opposition to accredit the concurrence of a legitimate and well-founded reason, referred to the your specific personal situation, which justifies the cessation of the processing of your personal data. However, in those cases in which the treatment is unlawful, the legitimate and well-founded reason would become the unlawfulness itself.

In view of the above, it will be necessary to determine, first of all, whether in the specific case at hand we are dealing with a case in which the consent of the affected person is not necessary for the processing of their data, in other words, it is necessary elucidate whether we are faced with a case in which the treatment carried out by the person in charge of the file is lawful in accordance with the rules governing the fundamental right to the protection of personal data.

In the present case, the inclusion of the claimant's health data in the HC3 aims to improve the health care provided to the claimant here. Specifically, the Department of Health publishes the following information about HC3 on the My Health portal (<https://lamevasalut.gencat.cat>):

"Tool of the Department of Health which incorporates the most relevant data derived from care for people in the care centers of the public health system in Catalonia.

Health professionals, after accreditation and authorization, can share and consult the clinical history information of the people they care for, from the different hospitals, primary care centers and urgent and emergency services.

Having this instrument improves the quality of care, the use of resources, the empowerment of people and, therefore, the efficiency of the public health system.

People can access this information through La Meva Salut, where they can consult the documents and reports that have been published in the HC3."

Taking into account the stated purposes, the treatment of the claimant's health data resulting from the incorporation of data into the HC3, without his consent, would be covered by article 7.6 of the LOPD, applicable to the facts .

Regarding the assessment of the concurrence of the person here claiming a legitimate and well-founded reason, referring to his specific personal situation that justifies the cessation of the processing of his personal data, in the opposition request he stated that making his information available to healthcare professionals from other centers - different from the issuer - could "harm him personally and professionally". And about the generic nature of his request, he pointed out that: "at the hospital they ask me to make a statement of opposition every time I have a test", and for this reason he requested: "if it is possible that in the future, not I had to do it and my information is not shared directly". In particular, he noted the following information he wished not to be accessible in HC3: clinical reports, diagnoses, agenda and reason for visits.

Finally, regarding the consequences that his request could have on health care, he added: "I am aware of the risks that this may bring at the time of assistance and I assume them, since I have "a cd with all the information".

With regard to the reasons put forward by the claimant to justify his opposition request, he indicated that: "this treatment can harm me personally and professionally".

In order to assess whether or not to consider the opposition request, it would be necessary to first weigh the rights and interests in conflict. In this regard, it must be noted that the Authority does not have CatSalut's opinion, despite having repeatedly requested it, especially in order to assess whether the estimate of the request made could have a negative impact in the assistance provision. Well, as indicated in the antecedents, it is known that CatSalut has been repeatedly requested to express its opinion on the claim of the claimant here, for the reasons indicated. And also that CatSalut has remained silent, so that it would not have put forward any reason that, based on the negative impact it could have on the medical assistance to the affected person, would prevent access to its claim. This is how things are, taking into account the damages expressed by the person here claiming, regarding which the Department has remained silent. manifest, it is considered appropriate to estimate the claim presented.

This decision is corroborated by CatSalut's forecasts on the management of HC3 published on the Internet. Specifically, on the website of the Quality and Evaluation Agency Sanitàries de Catalunya (AQuAS) has published the document entitled "Protocol of action regarding the exercise of the rights of access, rectification, cancellation and opposition to the shared clinical history of Catalonia (HC3)", revised the month of October 2015, in which the possibility is expressly provided for the affected person to object to their data being included in the HC3. Specifically, in point 2.4 the following is noted, among others:

"In the case of HC3, the right of opposition is based on the fact that the treatment of a patient's data may harm him in some way that must be justified.

In this context, the right of opposition consists in the possibility that citizens have to express their wish that their health data, collected in their personal clinical history in a care center in Catalonia, not be

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placed, through the HC3, at the disposal of other health professionals from other health centers, or that certain treatments are not carried out."

And in this case where the citizen submits a request for opposition in the terms indicated, point 6.1.4 provides that: "The Department of Health [that is, CatSalut] must respond to the affected person. In the event that the requested opposition is granted, the Department of Health will notify the entity/care center so that it adopts the necessary technical measures to make it effective". And in point 6.5 it is foreseen, for what is of interest now, that: "If this right is exercised before the Department of Health and refers to data included in the HC3, this Department must respond to the affected in time and the way established by the data protection regulations. In the event that the requested opposition is granted, the Department of Health will notify the entities/care centers so that they adopt the necessary technical measures to make it effective".

For the reasons stated, it is necessary to assess the claim presented by the claimant, both from a formal point of view - given that CatSalut had not responded to the opposition request within the legally established term - and from a background perspective, for the reasons just explained.

5.- In accordance with what is established in articles 16.3 of Law 32/2010 and 119 of the RLOPD, in cases of estimation of the claim for the protection of rights, the person in charge of the file must be required so that within the term of 10 days to make the exercise of the right effective.

In accordance with this and with what has been set forth in the legal basis 4tr, it is necessary to require the Department of Health so that within 10 counting days from the day after the notification of this resolution, make effective the right of opposition of the claimant here, in the terms previously indicated.

For all that has been exposed,

RESOLVED

First.- Estimate the guardianship claim made by Mrs (...) against the Department of Health of the Government of the Generalitat.

Second.- Request the Department of Health so that, within 10 counting days from the day after the notification of this resolution, proceed to respond to the opposition request made by the claimant in the manner indicated in the fourth legal basis, in relation to the third legal basis.

Third.- Notify this resolution to the Department of Health, the Catalan Health Service and the person making the claim.

Fourth.- Order the publication of the Resolution on the Authority's website ([www.apd.cat](http://www.apd.cat)), in accordance with article 17 of Law 32/2010, of October 1.

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Against this resolution, which puts an end to the administrative process in accordance with articles 26.2 of Law 32/2010, of October 1, of the Catalan Data Protection Authority and 14.3 of Decree 48/2003, of 20 February, by which the Statute of the Catalan Data Protection Agency is approved, the interested parties can file, as an option, an appeal for reinstatement before the director of the Catalan Data Protection Authority, in the period of one month from the day after its notification, in accordance with the provisions of article 123 et seq. of Law 39/2015 or directly file an administrative contentious appeal before the administrative contentious courts of Barcelona, within two months from the day after its notification, in accordance with articles 8, 14 and 46 of Law 29/1998, of July 13, regulating administrative contentious jurisdiction.

Likewise, the interested parties may file any other appeal they deem appropriate for the defense of their interests.

The director,