

Carrer Rosselló, 214, Esc. A, 1r 1a
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RESOLUTION of the procedure for protection of the right of access no. PT 29/2017, urged (...) against the Department of Health (Catalan Health Service) of the Government of the Generalitat

Background

1.- On 02/06/2018 the Catalan Data Protection Authority received a letter from Mr. (...), for which he made a claim for the alleged neglect of the rights of access, opposition and cancellation to his shared medical history in Catalonia (hereafter, 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.

The claim regarding the neglect of opposition and cancellation rights led to the opening of rights protection procedure no. PT 28/2018, while the object of the resolution issued in the present procedure is the right of access.

In relation to the alleged neglect of the right of access, in the letter of claim presented to the Authority, the person making the claim indicated that the right of access had not been exercised, and that there had been improper access to your medical history.

He accompanied his letter with various documentation, which included a property liability claim made by this same person on 09/01/2018 against the Department of Health, based on the alleged improper access to his HC3, and through which requested: "to know the identity of the people who have made these improper accesses". In the body of the letter of claim, it indicated, for what is now of interest, the following:

"Consulting access to my HC3 shows improper access by staff who have not had a care relationship with me.

Specifically, from the Josep Trueta hospital, a center where I have never been treated, and from the Figueres Hospital, a center where I have not been treated for years."

Among the documentation provided by the now claimant was also a written date 05/23/2018 addressed to the Catalan Health Service (hereinafter, CatSalut), in which he referred to improper access, noting the following:

"Regarding the improper access to the Josep Trueta hospital dated 17/11/2017, I am told that it is from the IAS Parc Hospitalari Martí i Julià de Salt, another hospital where I have never been treated, remains improper access (...).

(...)

Attached is a list of the accesses made to my medical history where not nothing appears for 11/17/2017, the day of the unauthorized access."

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 character (hereinafter, RLOPD i

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LOPD, respectively), applicable to the present case as it concerns the regulations in force at the time when the access request was made (10/02/2017), by means of official document dated 06/11/2018 the claim was transferred to the claimed entity so that within 15 days it could formulate the allegations it considered pertinent.

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 included in the HC3, through Resolution SLT/2376/2015, of September 17, the Department of Health delegated to CatSalut the taking into consideration, management and attention of the requests of 'exercise of 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.

3.- CatSalut made allegations in a letter dated 07/08/2018, in which it set out, in summary and what is of interest here, the following:

"First. On October 2, 2017, Mr. (...) requested the exercise of the right of access and opposition and cancellation in relation to four reports included in his shared medical history of Catalonia (HC3).

On October 26, 2017, the applicant was answered indicating that (...)

On November 9, 2017, a letter was sent to the applicant stating that (...). Finally, the requested accesses are attached. It is attached as document no. 2.

The documents presented show that the right of access exercised by Mr. (...) was taken care of, that he was informed of the requirements of the right of cancellation and that the right of opposition was accepted and inform of the reasons why it cannot be implemented immediately.

second (...)"

As document no. 1 contained an email that the now claimant sent to CatSalut on 03/11/2017, in which he reiterated his request for access in the following terms:

"(...) On the other hand, I am still interested in accessing my HC3, right of access, and if possible I would like to see the traceability."

As document no. 2, there was an office from the CatSalut Citizen Service Department, dated 6/11/2017, in response to the email sent by the now claimant, in which they informed him of the following regarding his access request:

"2.- We are attaching the access to your medical history, as you requested."

As document no. 3 contained a letter dated 01/11/2018 from the CatSalut Citizen Service Department, addressed to the person making the claim, in which they informed him of the following:

"1.- (...)"

2.- We are attaching the access to your medical history, as you requested.

As you already know, with "LMS" - referring to the La Meva Salut portal - the accesses we observe and, according to the dates, are due to the checks carried out at the different centers to be able to cancel the documents .

This fact occurs because some centers use the same information system, as is the case of the ICS, and their hospitals as other Primary Care entities.

We consider that they are not incorrect accesses, since the different actions that have to be carried out must be being checked. This could justify a report being inaccessible for a few days and then reappearing."

4.- As a result of various procedures carried out by the Authority, on 12/19/2018 a letter of response was received from CatSalut, complementary to the first, accompanied by various information. In the written response, the following was pointed out in relation to the accesses to the HC3 of the now claimant:

"The HC3 does not have the functions of de-publication or publication, the entities themselves are responsible for carrying out these actions. It is for this reason that sometimes you can see access by technicians from entities such as the Figueres Hospital, which is part of the entity that manages Moisès Broggi's ABS, similar is the case of the Trueta Hospital , is ICS and they manage the ABS".

Among the documentation provided by CatSalut was also a copy of the request for access presented by the person making the claim, as well as a copy of the traceability or list of accesses made to their HC3, and several emails sent. In the request for access to the HC3, dated 2/10/2017, the now claimant indicated the reasons for requesting access:

"It's my data, I want to access it, see if the HC3 data and my Health are the same, I'd also like to see the access logs, who accessed them, which files, how many times, hours of access, etc."

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 movement of these (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 access that is here was exercised object of claim.

3.- Organic Law 3/2018, of December 5, on the protection of personal data and the guarantee of digital rights, has repealed the LOPD, but for the temporary reasons indicated in the 2nd legal basis, the present claim has to be resolved based on the repealed LOPD. Well, article 15 of the old LOPD determined the following in relation to the right of access:

- "1. The interested party has the right to request and obtain free of charge information about their personal data being processed, the origin of the data and the communications made or planned to be made.
2. The information can be obtained through the mere consultation of the data through visualization, or the indication of the data that is the subject of treatment through writing, copying, telecopy or photocopy, certified or not, in a legible and intelligible form legible, without using keys or codes that require the use of specific mechanical devices.
3. The right of access referred to in this article can only be exercised at intervals of no less than twelve months, unless the interested party proves a legitimate interest for this purpose, in which case they can exercise it earlier."

For its part, article 27 of the RLOPD, in its first and second section, provides the following regarding the right of access:

"1. The right of access is the right of the affected person to obtain information on whether their own personal data is being processed, the purpose of the processing that, if applicable, is being carried out, as well as the information available on the origin of the aforementioned data and the communications made or planned for this data.

2. By virtue of the right of access, the affected person can obtain from the controller information relating to specific data, to data included in a certain file, or to all their data subjected to processing.

However, when reasons of special complexity justify it, the person in charge of the file may request the affected person to specify the files in respect of which he wishes to exercise the right of access, and for this purpose he must provide him with a list of all the files."

Likewise, also on the right of access, article 29 of the RLOPD establishes the following:

"1. The person in charge of the file must decide on the access request within a maximum period of one month from the receipt of the request. After the deadline has passed without an express response to the access 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.

2. If the request is approved and the person in charge does not accompany his communication with the information referred to in article 27.1, access must take effect within ten days of the aforementioned communication.
3. The information provided, regardless of the medium in which it is provided, must be provided in a legible and intelligible manner, without the use of keys or codes that require the use of specific mechanical devices.

The information must include all the basic data of the affected person, the results of any computer processing or process, as well as the information available on the origin of the data, the transferees of the data and the specification of the specific uses and purposes for which the data was stored.”

Apart from the regulation that has just been transcribed, in the case analyzed here, the applicable health regulations must also be taken into consideration. Specifically, the Basic State Law 41/2002, of November 14, on Patient Autonomy, establishes in its article 18 the right of access to the clinical history in the following terms:

“Rights of access to the clinical history 1.

The patient has the right of access, with the reservations indicated in section 3 of this article, to the documentation of the clinical history and to obtain a copy of the data contained therein . Health centers must regulate the procedure that guarantees the observance of these rights.

2. The patient's right of access to the clinical history can also be exercised by duly accredited representation.”

3. The patient's right of access to the clinical history documentation cannot be exercised to the detriment of the right of third parties to the confidentiality of the data contained therein collected in the patient's therapeutic interest, nor to the detriment of the right of professionals who participate in its preparation, who can object to the right of access to the reservation of their subjective annotations.

4. Health centers and private practitioners must only provide access to the medical records of deceased patients to people who are related to them, for family or de facto reasons, unless the deceased has expressly prohibited it and be accredited in this way. In any case, a third party's access to the medical history motivated by a risk to their health must be limited to the relevant data. Information that affects the privacy of the deceased or the subjective notes of professionals must not be provided, nor that harms third parties.”

For its part, article 13 of Catalan Law 21/2000, of December 29, on Patient Autonomy and Rights to Information and Clinical Documentation, determines the following:

“Rights of access to the clinical history

1. With the reservations noted in section 2 of this article, the patient has the right to access the medical history documentation described in article 10, and to obtain a copy of the data contained therein. It is up to the health centers to regulate the procedure to guarantee access to the clinical history.

2. The patient's right of access to the documentation of the clinical history can never be to the detriment of the right of third parties to the confidentiality of their data appearing in the aforementioned documentation, nor of the right of the professionals who have

involved in the preparation of this, who can invoke the reservation of their observations, appreciations or subjective notes.

3. The patient's right of access to the clinical history can also be exercised by representation, as long as it is duly accredited."

Lastly, article 18 of the LOPD, regarding 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 provides:

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

4.- Once the above has been established, it is appropriate to analyze the substance of the claim, that is to say, whether the answer given by CatSalut to the request of the now claimant conformed to the precepts transcribed in the 2nd legal basis.

As a starting point, it should be borne in mind that article 15 of the LOPD, in force at the time the access request was submitted, defined the right of access as the right of the affected person to obtain information about your own personal data that is being processed and, where applicable, about the purpose of the processing, as well as the information available about the origin of the said data and the communications made or planned. It is worth saying that this configuration of the right of access is very similar to the one contained today in Article 15 of the GDPR.

The right of access is a very personal right, and constitutes one of the essential powers that make up the fundamental right to the protection of personal data. As has already been advanced, through the right of access the owner of the data can find out which data about his person are the subject of treatment. In addition, this right could be the basis for the exercise of other rights, such as those of cancellation, rectification or opposition. This is why the limitations to this right of access must be minimal given that through its exercise the effectiveness of the fundamental right to the protection of personal data is guaranteed.

As has been said, it is proven in the procedure that the claimant exercised on 02/10/2017 the right of access before the Department of Health through a

model form entitled "Request for the exercise of the right of access to the shared clinical history of Catalonia", in relation to (1) all your data that was included in your HC3, as well as in relation to (2) the accesses to your HC3 that had been made. In relation to this second request (2), he asked specifically information about: the access logs, the people who had accessed them, the scope of each of the accesses, the number of accesses made by each person, and the hours at which they had access.

With regard to the person in charge of responding to the access request, it is necessary to take into account what has been pointed out in point 2 of the background, regarding the fact that, although the Secretary General of the Department of Health is the body responsible for the file "Register of health information of patients" where the personal data that are incorporated into the HC3 are collected, through Resolution SLT/2376/2015, of 17/09 the Department of Health delegated in CatSalut takes into consideration, manages and attends to 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 who had to respond to the access request made by the claimant here.

4.1. With regard to the first information requested (1), this Authority is not aware that CatSalut had given the person claiming here a copy of all their data contained in their HC3. The various letters and emails sent to the now claimant that have been submitted to the Authority, only refer to the delivery of documentation with information regarding access to their HC3. The mere finding of this end leads to the estimation of the claim with regard to this information.

4.2. With regard to the second information requested by the now claimant (2) regarding access to his HC3, it should be noted that the information regarding the identity of the people who have accessed is not part of the right of access the clinical history of the claimant, whether they are users of the same center or another. In accordance with the regulations that have been transcribed in the 2nd legal basis, the right of access only forms part of the right of access, for what is now of interest, the information relating to the communications made or planned. In this regard, it should be borne in mind that all accesses made to the HC3 by healthcare professionals - or at least, most accesses constitute a communication of data - in the terms provided for in art. 11 of the former LOPD-, since the people who access it to consult the information contained in it are, in most cases, professionals who attend to the patient/user (here the claimant) and who provide services for a different entity to the person in charge of the file (Department of Health); and therefore, the health centers from which HC3 is accessed are considered "third parties". This in most cases, because if access to the HC3 is carried out, for example, by the same professional who attended the user/patient and issued the medical report consulted in the HC3, then the treatments in issue (access to the HC3) cannot be considered a data communication.

With respect to the "traceability" information that the claimant here also seeks to access, such as access logs, the number of times a person has accessed it, the time of access, etc., is information that is not part of the law

of regulated access to data protection legislation. It is true that the so-called Group of Article 29 - made up of the Data Protection Authorities of the member states of the European Union, the European Data Protection Supervisor, and the Commission European; today replaced by the European Committee for Data Protection - recommended to the member states of the European Union that they recognize the patient's right to know the information about who and when he has accessed his medical history, in order to generate confidence about the treatments carried out with your health data. But article 15 of the old LOPD does not contemplate this. Another thing is that CatSalut, despite not having a legal obligation to do so, facilitates this information by virtue of the principle of transparency, as happens when it attends to requests for information from patients about "traceability" regarding their medical history.

For the reason stated, the part of the claim made that refers to this information that does not form part of the right of access should be dismissed from the outset.

With regard to the information regarding the communications made or planned, CatSalut has stated that it provided the now claimant with the information regarding the accesses made to its HC3, in the sense that it informed him about the health centers from which your HC3 was accessed. And to that end, he has provided the Authority with the documentation that he would have given to the now claimant, indicative of that end.

Regarding the eventual or eventual improper accesses, the now claimant refers in particular to two accesses, which according to him would have been carried out from the Girona Hospital Dr. Josep Trueta and from the Figueres Hospital. In this regard, from the statements made by CatSalut before the Authority in the hearing procedure, together with the documentation provided, it can be inferred that the questioned accesses would have their *raison d'être* in the attempts to depublish the aforementioned medical reports in order to make effective the right of opposition that had been exercised by the claimant here, with the particularity that these accesses would have been made from different centers to the issuer of each report, a circumstance that would have led the person now claiming to assume it was improper access. This would be the case, according to CatSalut, of the accesses carried out from the Figueres Hospital on 12/12/2017 with respect to the report issued on 10/02/2017 by CAP Dr.

Moisès Broggi, or the accesses made from the Girona Hospital Dr. Josep Trueta on 17/11/2017.

In any case, it is not appropriate in this guardianship procedure to make an assessment of the possible illegality of the accesses to the HC3 of the now claimant, but only to verify that he was indeed given the requested information regarding to the communications made regarding the data included in your HC3. In this regard, CatSalut has submitted to the Authority several documents addressed to the now claimant, through which he was given a copy of the list of accesses made to his HC3, and has also submitted to the Authority a copy of the said lists delivered. This, together with the fact that in the letter of claim the claimant did not question such delivery, leads to the conclusion that CatSalut provided the now claimant with information on the communications to third parties of the data listed in its HC3 .

In conclusion, based on everything explained up to this point, it is necessary to estimate the present claim, solely with regard to the delivery to the person now claiming of a copy of his HC3, and to reject it with regard to the rest of the information requested by this person.

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, it is necessary to request the Department of Health so that within 10 days, counting from the day after the notification of this resolution, deliver to the person here claiming a copy of his HC3. Once the right of access has taken effect in the terms set out and the person making the claim has been notified, within the same 10-day period the Department of Health must report to the Authority.

For all that has been exposed,

RESOLVED

First.- Estimate the guardianship claim made by Mr. (...) against the Department of Health (CatSalut), solely with regard to giving the claimant a copy of their shared medical history, and dismissing it as regards the rest of the requested information, for the reasons set out in the 4th legal basis.

Second.- Request the Department of Health (CatSalut) so that, within 10 counting days from the day after the notification of this resolution, it makes effective the right of access exercised by the person making the claim, in the form noted in the 5th foundation of law. Once the right of access has taken effect, within the same period of 10 days the claimed entity must report to the Authority.

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

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

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.

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

The director,

M. Àngels Barbarà and Fondevila

Barcelona, (on the date of the electronic signature)

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