apdcat
Autoritat Catalana de Protecció de Dades

Carrer Rosselló, 214, Esc. A, 1r 1a
08008 Barcelona

File identification

Resolution of the rights protection procedure no. PT 24/2021, petition against the Catalan Health Institute.

Background

1. On 02/23/2021, the Catalan Data Protection Authority received a letter from Mr. (...) (hereinafter, the person making the claim) against the Catalan Institute of Health (hereinafter , ICS), for which he made a claim for the alleged neglect of the right of access to the personal data of his clinical history, which he had previously exercised before the Primary Care Center (CAP) Alt Penedès, dependent on the ICS .

The person claiming provided various documentation relating to the exercise of this right, from which it was inferred that on 29/12/2020 he requested, through the virtual office of procedures of the Administration of the Generalitat (ovt.gencat.cat), access to his CAP medical history (...) (application with code (...), stating that this was the CAP he had been assigned from year 1977 until approximately 2014, in addition to making occasional emergency visits there when other primary care centers were assigned.

In his request for access, the claimant specified that he was interested especially medical information regarding an anaphylactic shock or an illness suffered around the year 1981, to be relevant information for your health at the current time of the covid-19 pandemic, in which "newly created vaccines" are being supplied.

As attached documentation, he provided several emails in response to his access request, issued on 12/01/2021 and 4/02/2021 by the Catalan Health Service (CatSalut), in the second of which CatSalut told him that he had to go directly to the corresponding CAP and request access.

Next, the claimant stated that on 5/02/2021 he called the CAP (...) requesting access to his medical history from the late seventies, and that from this CAP they stated that the information was probably kept on paper in some warehouses, but that a judicial authorization was needed to access this documentation. In the last one, he pointed out that on 8/02/2021 he received a call from the CAP (...), where they told him that the medical documentation should only be kept for fifteen years. The complaint that the claimant makes before this Authority, lies in the fact that he considers that the aforementioned CAP would not have checked whether the medical documentation with his personal data had indeed been destroyed, and in any case he considers that he should have provided a copy of the documents from his medical history which, according to the fifteen-year term, should be kept, and which would be those dated after 2006.

2. On 02/03/2021, the claim was transferred to the ICS in order for it to formulate the allegations it deemed relevant.

3. On 6/04/2021 the Authority received the response of the claimed entity, made up of two letters: on the one hand, a letter of 4/03/2021, from the director of the Team 'Primary Care (EAP) of (...) del Penedès, in which the reasons for denying access were set out; and on the other hand, a Resolution of 04/06/2021 of the director of the Office of the Health Data Protection Delegate (hereafter DPD of the ICS), estimating the right of access.

- In the letter dated 03/4/2021, the following was indicated:

"1. On 05/02/2021 Mr. (...) made a telephone call to the CAP (...) requesting his medical history from the 1980s. From the CAP (...) the gentleman was informed that the clinical histories from so many years ago are in paper format kept in external warehouses and that their request must be duly motivated. In any case, at the gentleman's insistence, we decided to make the inquiry to be sure of the information we were giving and to call him when we had it.

2. On 08/02/2021 the gentleman is called in order to respond to his request. You are informed that according to article 12.4 of Law 21/2000 of December 29 on the rights of information concerning the patient's health and autonomy and clinical documentation, a minimum retention period of the most relevant documentation of the clinical history that is fifteen years from the date of registration of each care process. We inform you that if you ask for it in court, it could be searched. In no case do you request this information in writing.

3. As of today 4/03/2021, we are not aware of any written request from the claimant.

conclusion
We believe that with the actions that have been carried out at no time have the rights of citizens been violated nor have any irregularities occurred."

- In the Resolution of 04/06/2020 of the DPD of the ICS, the related facts and the data protection regulations governing the right of access are set out, and in its dispositive part the following is indicated:

"First.- APPRECIATE the request for access in the terms set forth.
Second.- URGE the ICS to consider the interested party's access request and inform him if the requested documentation is available in paper format in the warehouses

indicated external parties, if so, a copy of the same shall be delivered."

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4. On 04/21/2021, the instructor of the procedure carried out a search for information on the ICS corporate website about the exercise of the right of access, and accessed the page entitled "ARCOPOL Rights" , which contains the following information (http://ics.gencat.cat/ca/lics/responsabilitat-social-corporativa/drets-arco/#bloc4):

"The preferred channels that the ICS envisages to deal with requests to exercise rights are the following:

- Through the requests submitted to the ICS assistance centers that generate the information subject to the exercise of rights.

- Through requests submitted to the Corporate Center of the ICS.

- In the case of the right of access, it can also be exercised through La Meva Salut, when properly implemented.

- Any other way than those foreseen by the administrative procedure.

Preferably it will be done through the form that will be provided to the centers, although it is not mandatory. It must always be submitted in writing and the procedure will be free."

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. Article 15 of Regulation (EU) 2016/679 of the European Parliament and of the Council, of April 27, relating to the protection of natural persons with regard to the processing of personal data and the free movement of such data (hereafter, the RGPD), regarding the right of access of the interested person, provides that:

"1. The interested party will have the right to obtain from the controller confirmation of whether or not personal data concerning him or her are being processed and, in such case, the right to access personal data and the following information:

a) the purposes of the treatment;
b) the categories of personal data in question;
c) the recipients or the categories of recipients to whom the personal data was communicated or will be communicated, in particular recipients in third parties or international organizations;

d) if possible, the expected period of personal data conservation or, if not possible, the criteria used to determine this period;

e) the existence of the right to request from the person in charge the rectification or suppression of personal data or the limitation of the treatment of personal data relating to the interested party, or to oppose said treatment;

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f) the right to present a claim before a control authority;
g) when the personal data has not been obtained from the interested party, any available information about its origin;
h) the existence of automated decisions, including profiling, referred to in article 22, sections 1 and 4, and, at least in such cases, significant information about the logic applied, as well as the importance and expected consequences of said treatment for the interested party.

2. When personal data is transferred to a third country or an international organization, the interested party will have the right to be informed of the appropriate guarantees under article 46 relating to the transfer.

3. The person responsible for the treatment will provide a copy of the personal data subject to treatment. The person in charge may charge a reasonable fee based on administrative costs for any other copy requested by the interested party. When the interested party presents the request by electronic means, and unless he requests that it be provided in another way, the information will be provided in a commonly used electronic format.

4. The right to obtain a copy mentioned in section 3 will not negatively affect the rights and freedoms of others."

In relation to the rights contemplated in articles 15 to 22 of the RGPD, paragraphs 3 to 5 of article 12 of the RGPD, establish the following:

"3. The person in charge of the treatment will provide the interested party with information related to their actions on the basis of a request in accordance with articles 15 to 22, and, in any case, within one month from the receipt of the request. This period can be extended another two months if necessary, taking into account the complexity and the number of requests. The person in charge will inform the interested party of any such extension within one month of receipt of the request, indicating the reasons for the delay. When the interested party submits the request by electronic means, the information will be provided by electronic means whenever possible, unless the interested party requests that it be provided in another way.

4. If the person in charge of the treatment does not comply with the request of the interested party, he will inform him without delay, and no later than one month after receiving the request, of the reasons for his non-action and of the possibility of submitting a claim before a control authority and exercise judicial actions.
5. The information provided under articles 13 and 14 as well as all communication and any action carried out under articles 15 to 22 and 34 will be free of charge. (...)"

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For its part, article 13 of Organic Law 3/2018, of December 5, on the protection of personal data and guarantee of digital rights (hereafter LOPDGDD), also regulates the right of access.

As limitations to the right of access, article 23.1 of the RGPD establishes the following:

> *"1. The Law of the Union or of the Member States that applies to the person responsible or the person in charge of the treatment may limit, through legislative measures, the scope of the obligations and the rights established in articles 12 to 22 and article 34, as well as in article 5 to the extent that its provisions correspond to them*
> *rights and obligations contemplated in articles 12 to 22, when such limitation*
>
> *It essentially respects fundamental rights and freedoms and is a necessary and proportionate measure in a democratic society to safeguard:*
>
> *a) the security of the State;*
> *b) the defense;*
> *c) public security;*
> *d) the prevention, investigation, detection or prosecution of criminal offenses or the execution of criminal sanctions, including the protection against threats to public security and their prevention;*
> *e) other important objectives of general public interest of the Union or of a Member State, in particular an important economic or financial interest of the Union or of a Member State, including in the fiscal, budgetary and monetary areas, public health and social Security;*
> *f) the protection of judicial independence and judicial procedures;*
>
> *g) the prevention, investigation, detection and prosecution of violations of deontological norms in the regulated professions;*
> *h) a function of supervision, inspection or regulation linked, even occasionally, with the exercise of public authority in the cases contemplated in letters a) ae) and g);*
>
> *i) the protection of the interested party or the rights and freedoms of others;*
> *j) the execution of civil demands."*

In relation to the above, article 16.1 of Law 32/2010, of the Catalan Data Protection Authority, regarding the protection of the rights provided for by the regulations on personal data protection, 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 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."*

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3. Having explained the applicable regulatory framework, it is now appropriate to refer to a formal issue invoked by the claimed entity.

In the letter dated 03/4/2021, the ICS cites as one of the reasons for rejecting the access request made by the person making the claim, the fact that this person did not submit their request in writing to the CAP Alt Penedès, limiting yourself to making your request in a telephone call.

Certainly, the telephone call is a fact not contradicted by the claimant's account.
However, in this case it must be taken into account that the person making the claim previously submitted in writing a request for access to their medical history. Specifically, from the documentation provided by the claimant before the Authority it can be inferred that on 12/29/2020 she submitted the access request electronically, in the LaMevaSalut space accessible through the virtual office of procedures of the Generalitat, which is, as reported by the ICS itself on its corporate website, one of the valid channels for submitting requests for access to the clinical history. It is true that on the corresponding page of the ICS website (transcribed in antecedent 4), it is indicated that the preferred channel is the presentation of the request to the corresponding center, but it is expressly stated that this option is not is mandatory *("It will preferably be done through the form that will be provided to the centers, although it is not mandatory").* In any case, the truth is that the person making the claim accompanied his claim with two e-mails sent to him by CatSalut in

dates 12/01/2021 and 4/02/2021, for which a response was given to your request for access.
And it can be seen that in none of them is the person making the claim informed that the channel used is incorrect, nor is it pointed out that CatSalut is not the competent body. Specifically, in the first email CatSalut informed him that the information requested by the claimant was not included in the shared clinical history (HC3). And in the second email from CatSalut, the following was pointed out at the end: *"you can try to contact the CAP directly and ask if they have HC on paper, and since what years",* with which statement it could well be understood that it was not necessary for him to submit the access request again, the option of making a phone call to the CAP Alt Penedès being valid, as he did on 05/02/2021. In any case, it cannot be forgotten that article 40 of Law 40/2015, of October 1, on the Legal Regime of the Public Sector establishes the obligation of the administrative body deemed incompetent to resolve a matter, to refer it directly to the body it deems competent. Therefore, if CatSalut considered that it was not the competent body to resolve the access request, it should have forwarded the request to CAP Alt Penedès, or whoever it considered to be the competent body.

In conclusion, if the ICS considered that the person making the claim here had to present the request for access again to the CAP Alt Penedès, it should have informed him, or he should have sent the request directly request for access to the CAP. This omission prevents attributing to this person the formal defect invoked by the ICS.

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4. Next, it is necessary to analyze whether, in accordance with the precepts transcribed in the 2nd legal basis, the person claiming the right of access should be recognized with respect to the data in their medical history.

With regard to this issue, it is stated that the answer fully coincides with the estimated meaning of the resolution dated 04/06/2021 issued by the DPD of the ICS.

As a starting point, it should be borne in mind that article 15 of the RGPD defines the right of access as the right of the affected person to obtain information about their own personal data that is the subject of treatment and, in such case , access said data and information on the purposes of the treatment, the categories of personal data, the recipients to whom the personal data have been communicated or will be communicated, as well as the rest of the information detailed in article 15.1 of the RGPD In addition, article 15.3 of the RGPD expressly recognizes the right of any person to obtain from the data controller a copy of the document containing the personal data for which access has been requested.

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. In addition, this right could be the basis for the exercise of other rights, such as those of rectification, deletion, limitation, portability 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. The reasons for denying the right of access can be found in article 23 of the RGPD, which must be foreseen *"through legislative measures" (art.* 23.1 RGPD).

In the statement of objections dated 03/04/2021, the ICS has indicated two reasons for denying access:

On the one hand, the ICS has pointed out that, since it is a medical history *"from so many years ago",* this history is *"in paper format kept in external warehouses and that its request must be duly motivated."*

In this regard, it must be made clear that it is not necessary for the request for access to personal data to be motivated. Article 15 of the GDPR does not require it in any case. Therefore, the fact that the requested documentation is on paper or that it is filed in a warehouse external to the CAP, is not a valid reason to require the applicant for access to justify or explain the reason for his request And, in accordance with Article 23 of the RGPD, it is also not a valid reason for limiting or denying the access request.

As a second reason for denying access, the ICS has pointed out that the request required it to be made through a judicial request *("if it was requested judicially, it could be searched").*

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This reason for refusal should also be rejected for the same reasons. Neither articles 12.3 and 15 of the RGPD require that the request for access be conveyed through a judicial petition, nor can this reason be included in any case of limitation or denial of the right of access provided for in article 23 of the RGPD.

That being the case, it is necessary to recognize the claimant's right of access to his medical history that he opens in the CAP Alt Penedès, its location or format being irrelevant, given that what is relevant is that the claimant's personal data appear there , and there is no doubt of this fact, according to the definition of personal data contained in article 4.1 of the RGPD.

Having said that, it is another matter that the personal data requested by the person making the claim have been deleted once the period for keeping the clinical history required by the health regulations has passed. Specifically, on the one hand, article 17.1 of Law 41/2002 of November 14, on Patient Autonomy, establishes the following:

> *"1. Health centers have the obligation to keep the clinical documentation in conditions that guarantee its correct maintenance and security, although not necessarily in the original support, for the proper assistance to the patient during the appropriate time in each case and, as at least five years counted from the date of registration of each care process.*

And on the other hand, Law 21/2000 of December 29, on the rights of information concerning the patient's health and autonomy, and the clinical documentation establishes the following in article 12, in its given wording by Law 16/2010, of June 3, amending Law 21/2000:

> *"1. The responsibility for guarding the clinical history rests with the management of the health centers, or with the health professionals who carry out their activity individually.*
>
> *2. The clinical history must be kept under conditions that guarantee the authenticity, integrity, confidentiality, preservation and correct maintenance of the registered healthcare information, and that ensure its full reproducibility in the future, during the time in which it is mandatory to keep it, regardless of the medium in which it is found, which does not necessarily have to be the original medium. 3. (...)*
>
> *4. The following documentation must be kept from the clinical history, together with the identification data of each patient, for at least fifteen years from the date of discharge of each care process: a) The sheets of informed consent. b) The discharge reports. c) Surgical reports and birth registration. d) Data relating to anesthesia. e) The reports of complementary explorations. f) The necropsy reports. g) Pathological anatomy reports.*

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5. (...)
6. The documentation that makes up the clinical history not mentioned in section 4 can be destroyed once five years have passed from the date of registration of each care process.
7. Notwithstanding what is established in sections 4 and 6, the documentation that is relevant to care effects, which must incorporate the document of advance wishes, and the documentation that is relevant, especially for epidemiological purposes, research or organization and operation of the National Health System (...) The clinical documentation is also must be kept for judicial purposes, in accordance with current regulations.

8. The decision to keep the clinical history, in the terms established by section 7, corresponds to the medical management of the health center, at the proposal of the doctor, with the prior report of the unit in charge of managing the clinical history in each center. This decision corresponds to the doctors themselves when they carry out their activity individually. (...)

And in the case, as suggested by the person making the claim, and inferred from the ICS statement of allegations, the fact that the CAP (...) has not reviewed whether the referred warehouse is kept the claimant's medical history makes it necessary to require such verification. Well, if there is personal data of the claimant, the ICS is obliged to provide him with a copy, in accordance with the provisions of article 15.3 of the RGPD. This, in addition to the information that must also be provided on the other extremes provided for in the first section of this same precept.

Lastly, regarding the complaint made by the person making the claim regarding the relevant clinical documentation that still would not have exceeded the fifteen-year retention period set by the ICS to consider that it had been deleted, it should be noted that the article 12.4 Law 21/2000 relates a type of medical documentation that must be kept *"at least for fifteen years from the date of registration of each care process",* so this precept does not establish any limit for keeping this documentation , but only a minimum obligation. And in addition, article 12.7 Law 21/2000 establishes that the clinical documentation technical commission can establish a longer term (the minimum of five or fifteen years foreseen) with respect to the documentation that is relevant for healthcare purposes. Therefore, it cannot be ruled out that documentation of the clinical history dated before the fifteen-year period indicated by the ICS has been preserved.

In short, the present claim for the protection of the right of access should be considered, given that in the present procedure it has been proven that the ICS did not make the right of access effective exercise

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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, it is necessary to require the ICS so that within 10 calendar days from the day after the notification of this resolution, make effective the exercise of the claimant's right of access, giving him the medical history he requested, as well as the rest of information provided for in article 15 of the RGPD. And in the event that part of the requested medical documentation has been deleted, you will need to be informed of this circumstance and of the reason for non-conservation.
Once the right of access has been made effective in the terms set out and the person making the claim has been notified, within the same period of 10 days the claimed entity must give an account to the Authority.

For all this, I resolve:

1. Estimate the guardianship claim made by Mr. (...) against the Catalan Institute of Health.

2. Request the Catalan Institute of Health 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 manner indicated to the foundation of law 5th. Once the right of access has taken effect, within the same period of 10 days the claimed entity must report to the Authority.

3. Notify this resolution to the Catalan Health Institute and the person making the claim.

4. Order the publication of the resolution on the Authority's website (apdcat.gencat.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 the LPAC or to directly file an administrative contentious appeal before the administrative contentious courts of Barcelona, in the period of 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, interested parties may file any other appeal they consider convenient for the defense of their interests.

The director,