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File identification

Resolution of the rights protection procedure no. PT 128/2022, urged against the Horta Guinardó Mental Health Association.

Background

1. On 10/30/2021, the Catalan Data Protection Authority received a letter from Mr. (...) (hereinafter, the person making the claim), from the content of which it was inferred that he complained that the Horta Guinardó Mental Health Association (hereinafter, ASM) had not provided him with a complete copy of his history clinic, as some paragraphs or annotations would have been hidden.

Along with his letter, the claimant provided numerous documents, among other things, the access request he had made before ASM on 11/12/2018 in which
he asked for *the "complete clinical report";* as well as the copy of the medical history that ASM would have provided him.

2. On 11/22/2021, a letter was sent to the claimant acknowledging receipt of his letter and informing him that it had given rise to a rights protection procedure with the aim of elucidating if ASM had disregarded his right of access by not having provided him with a complete copy of his medical history.

3. On 01/12/2021, the claim was transferred to ASM so that within 15 days it could formulate the allegations it deemed relevant.

4. ASM made allegations in a letter dated 12/23/2021, in which it set out, in summary, the following:

ÿ That in response to the request for access made by the claimant here on 11/12/2018, ASM sent him a letter summoning him on 11/12/2018 to give him a copy of the your medical history. In the same letter he was informed that *"the only restrictions on access to the clinical history by a patient are established by article 18.3 of Law 41/2002, of November 14, basic regulatory of the 'autonomy of the patient and rights and obligations in terms of information and clinical documentation'.*

ÿ That *"in accordance with the regulations and in exercise of the professionals' right of reservation, before handing over the copy of the clinical history, the subjective annotations were excluded"* and *"that beyond the non-inclusion of the mentioned subjective annotations , no other personal data has been omitted or removed in relation to the claimant that is being processed by ASM Horta Guinardó".*

5. In view of the allegations made, on 10/01/2022 the Authority sent a letter to ASM to provide the following documentation: a) complete copy of the history

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clinic of the person claiming with express indication of those parts that were not given to the person claiming to consider that they were subjective notes; and, b) the supporting documentation of the eventual invocation of the right of reservation by the professionals who made these notes.

6. On 02/07/20202, ASM responded to the previous request by providing, among other things, the following documentation:

a) A copy of the claimant's medical history in which those paragraphs that had been considered subjective annotations and which, therefore, had been extracted from the copy of the medical history that had been delivered to the here claiming

b) The signed statements of the five professionals who had made the notes extracts In defense of the non-inclusion of his annotations, four of these professionals invoke their right of reservation to subjective annotations, and the remaining professional invokes the right to confidentiality of third party data that appear there.

7. On 04/04/2022 the claimant provided more documentation.

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;*

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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;
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, establishes 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 applications. 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.

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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. When the requests are manifestly unfounded or excessive, especially due to their repetitive nature, the person in charge may:

a) charge a reasonable fee based on the administrative costs incurred to facilitate the information or communication or perform the requested action, or

b) refuse to act in respect of the request.
The person responsible for the treatment will bear the burden of demonstrating the manifestly unfounded or excessive nature of the request.
(…)"

For its part, article 13 of Organic Law 3/2018, of December 5, on the protection of personal data and guarantee of digital rights (hereinafter, LOPDGDD), determines the following, also in relation to the right to access:

"1. The affected person's right of access must be exercised in accordance with the provisions of Article 15 of Regulation (EU) 2016/679.
When the person in charge processes a large amount of data relating to the affected person and he exercises his right of access without specifying whether it refers to all or part of the data, the person in charge may request, before providing the information , that the affected person specifies the data or the processing activities to which the request refers.
2. The right of access is understood to be granted if the data controller provides the affected person with a remote, direct and secure access system to personal data that guarantees, permanently, access to all of it. To this end, the communication from the person in charge to the affected in the manner as
he can access the aforementioned system is sufficient to consider the request to exercise the right.
However, the interested party can request from the person in charge the information referred to the ends provided for in article 15.1 of Regulation (EU) 2016/679 that is not included in the remote access system.
3. For the purposes established in article 12.5 of Regulation (EU) 2016/679, the exercise of the right of access more than once during the period of six months can be considered repetitive, unless there is a legitimate reason for do it
4. When the person affected chooses a means other than the one offered to him that involves a disproportionate cost, the request must be considered excessive, so the said affected person must assume the excess costs that your choice behaves. In this case, the person in charge of the treatment is only required to satisfy the right of access without undue delay.".

Apart from the previous regulation, in the case analyzed here, it is also necessary to take into account the applicable health regulations. Specifically, Basic State Law 41/2002,

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of November 14, of 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.*
>
> *(...)"*

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.*
>
> *(...)."*

Finally, 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 appropriate to analyze the substance of the present claim below. As stated, the claimant's reason for complaint lies in the fact that, according to him, the copy of his medical record provided to him by ASM was incomplete, to the extent that some paragraphs or annotations would have been hidden.

For its part, in its statement of allegations, ASM has admitted that it delivered to the claimant a copy of his medical history that was not complete, and this because certain annotations had been extracted in accordance with the right of reservation to the subjective annotations that had been invoked by the healthcare professionals who had made them.
In order to prove the existence of this exception, ASM provided, on the one hand, the complete copy of the claimant's medical history - in which the annotations that were not included in the copy given to the claimant had been highlighted - and; on the other hand, the statements of the five professionals who made these notes, in which four of them invoked their right of reservation to the subjective notes, and the remaining professional the right to the confidentiality of the data of third parties listed in the aforementioned medical history.

Therefore, the information to which the claimant wants to access is incorporated in his medical history. Article 9.1 of the Catalan Law 21/2000 defines the clinical history as *"the set of documents relating to the care process of each patient while identifying the doctors and other care professionals who have intervened",* and article 15 of the Basic Law 41/2002 specifies that the clinical history *"must incorporate the information that is considered important for truthful and up-to-date knowledge of the patient's state of health".* It is therefore an instrument intended primarily to help guarantee adequate assistance to the patient, as determined by article 11.1 of Catalan Law 21/2000.

Once the object of the claim has been contextualized, it is now necessary to determine whether the affected person had the right to access the information that was denied to him by ASM.
As seen, 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 specifically, for what is of interest here, section 3 of this precept 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. 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 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 denial of the right of access can be found in article 23 of

the RGPD, which must be provided for *"through legislative measures" (art.* 23.1 RGPD).

The health legislation applicable to the case analyzed here also recognizes the patient's right to access the documentation of his history and to obtain a copy of the data contained therein, although it establishes certain limitations or restrictions. These limits include those relating to observations, assessments or subjective notes in those cases in which the professionals who have intervened in the preparation of the clinical history have exercised their right to reserve them; and also foresees as a limit the right to the confidentiality of the data of third parties that may be included in the documentation (art. 18 of the Basic State Law 41/2002 and art. 13 of the Catalan Law 21/2000).

As has already been explained, in its allegations before the Authority, ASM has stated that it was not delivered here claiming a complete copy of its medical history in accordance with the right of reservation to the subjective annotations invoked by professionals, and in order to certify this end, he provided this Authority with the documentation that is included in the 6th precedent (full copy of the medical history and the statements of the professionals).

At this point it must be said that the health legislation transcribed above does not define what is to be understood by "subjective annotation". Faced with this silence, the doctrine has defined them as personal impressions of the doctor about the patient's attitudes that have not been contrasted in an objective way; and also as annotations that collect impressions of the professional not supported by objective data that have no significance for the true knowledge or current state of health of the patient.

Several autonomous rules have addressed the concept of subjective annotation. Thus, without intending to be exhaustive, they have been defined as *"the impressions of health professionals, based on the exclusive perception of those, and which, in any case, lack transcendence for the true and up-to-date knowledge of the state of health of the patient, without them being considered a diagnosis" (article* 32 of Law 3/2005, on health information and patient autonomy of Extremadura); *"personal assessments, based or not on the clinical data available at that time, which are not part of the current clinical history of the patient or user, may influence the diagnosis and future medical treatment once confirmed" (art.* 21 of Decree 29/2009, of February 5, which regulates the use and access to the electronic clinical history, modified by Decree 164/2013 and Decree 168/2014 of Galicia); and, *"personal impressions or assessments of health professionals not directly supported by objective data or complementary evidence and which, in their opinion, are of interest to the health care of the patient" (Decree* 38/2012, of 13 of March, on clinical history and rights and obligations of patients and health professionals in terms of clinical documentation in the Basque Country).

Well, after analyzing the content of the annotations that were extracted from the medical history that was given to the claimant, it must be said that this Authority largely shares the criterion made explicit by ASM in the sense of denying him access exercised in that

regarding said annotations, based on the right of reservation to subjective annotations and also based on the right to confidentiality of third-party data included in said clinical history (right invoked by one of the professionals in the statement provided to this Authority). But in relation to the annotations that are detailed below, this restriction on access cannot be admitted, to the extent that this Authority considers that they could not fit into the concept of subjective annotation, nor are they data from third parties in relation to whose confidentiality can be invoked.

In particular, the notes of Dra are not considered subjective annotations. (...)of the days 13/04/2017, 03/05/2017, 08/08/2017, 03/10/2017 and 12/12/2017, which consist of a verbatim transcript of the e-mails sent to him by the claimant here. Regarding it is not superfluous to point out that in her statement the doctor herself explains that said notes are *"the patient's e-mail that I copied at the HC".* That being the case, it is necessary to estimate in part the claim made by the claimant here, as far as this specific information is concerned which was not delivered to him.

4. 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 protection of rights, the person in charge of the file must be required so that within the term of 10 days make effective the exercise of the right and provide here by claiming a copy of your medical history that includes the annotations made by Dra. (...) on 13/04/2017, 03/05/2017, 08/08/2017, 03/10/2017 and 12/12/2017 consisting of the verbatim transcription of the emails that had been sent to him by here claiming In accordance with what has been said, this copy will not have to contain those annotations that were already excluded from the copy that was provided at the time to the claimant here, based on the right of reservation to the subjective annotations and the right to the confidentiality of third party data, since this Authority considers this exclusion to be in accordance with the law.

In accordance with this, it is necessary to require the claimed entity so that, within 10 counting days from the day after the notification of this resolution, it makes effective the exercise of the claimant's right of access in the terms set out above. Once the right of access has been made effective in the terms set out and the person making the claim has been notified, in the following 10 days the claimed entity must report to the Authority.

For all this, I resolve:

1. Estimate in part the guardianship claim made by Mr. (...) against the Horta Guinardó Mental Health Association.

2. Request the Horta Guinardó Mental Health Association, 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 claiming, in the form noted in the foundation of

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right 4th Once the right of access has taken effect, within the following 10 days the claimed entity must report to the Authority.

3. Notify this resolution to the Horta Guinardó Mental Health Association. and the claimant.

4. Order the publication of the Authority's website (apdcat.gencat.cathttp://www.apd.cat/), in accordance with article 17 of Law 32/2010, of October 1. resolution

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,