National Data Protection Commission

OPINION/2021/42

I. Order

1. The Secretary of State for the Presidency of the Council of Ministers asked the National Data Protection Commission (CNPD) to issue an opinion on the Draft Decree-Law amending and republishing the legal regime for medico-legal expertise.

2. The CNPD issues an opinion within the scope of its powers and competences as an independent administrative authority with powers of authority to control the processing of personal data, conferred by subparagraph c) of paragraph 1 of article 57, subparagraph b) of Article 58(3) and Article 36(4), all of Regulation (EU) 2016/679, of 27 April 2016 - General Data Protection Regulation (hereinafter GDPR), in conjunction with the provisions of article 3, paragraph 2 of article 4, and paragraph a) of paragraph 1 of article 6, all of Law No. 58/2019, of 8 of August, which implements the GDPR in the domestic legal order.

3. Concerning the preamble, just two notes. The first, regarding the request and communication of clinical information: where the need not to neglect the obligations relating to medical secrecy and judicial secrecy is mentioned, the need not to neglect the obligations to protect personal data, as it is a fundamental dimension of human beings with constitutional dignity. The second, in the sense that the reference to the hearing of the CNPD is inserted therein.

4. It is also important to point out as very positive the initiative to provide for the communication of clinical information by electronic means, which can thus allow the exercise of expert functions with guarantee of confidentiality and integrity of the information, as well as the speed of access to it.

5. As for the articles, it is in Article 10 that the matter relating to access to information is intended to be regulated. In paragraph 1, doctors and other technicians are allowed access, when performing their expert duties, to relevant information, namely to the case file. In paragraph 2, it is possible to request directly from the hospital clinical services, by electronic means, clinical information referring to those examined in medico-legal and forensic processes. This information must also be provided electronically, within a maximum period of 30 days.

6. However, while in paragraph 1 access to information is limited to doctors and other technicians in the exercise of their expert

functions, in paragraph 2 it is foreseen that a plurality of directors of the National Institute of Legal Medicine and Forensic Sciences , IP. (INMLCF), can also request and receive clinical information,

II. Analysis

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namely the President of the Board of Directors, the directors of the delegations, the directors of the technical services, the coordinators of the functional units or the medico-legal and forensic offices.

7. However, access to personal data, and a fortiori to personal health data, which form part of a special category (cf. Article 9(1) of the GDPR) and, therefore, with reinforced legal protection, it is subject to the data minimization principle enshrined in Article 5(1)(c) of the GDPR, which is why only those who need it for the exercise of expert functions should have access to clinical information.

8. Indeed, there is no doubt that those involved in the investigations need to access pre-existing clinical information in the health services in order to understand the situations they are going to analyze; the access of the different management levels will only be justified if it is appropriate and relevant to the powers that are legally attributed to them and will have to be limited to what is strictly necessary for the purpose, not reaching, for example, for what type of powers of the president of the board of directors there is a need for access to identified personal data.

9. Thus, in order to maintain these accesses, the law must indicate what type of information they have access to and in the exercise of what competence. Only in this way can the basic principle of the need to know (need to know) be respected, which forms the entire legal regime for the protection of personal data.

10. Furthermore, the legislator chose to limit its intervention to the provision of the objective of adopting electronic means for the request and subsequent reception of clinical information, in paragraph 2 of article 10. However, there is a lack of regulation

that allows this objective to be achieved. In fact, it is essential that the law defines the main aspects of the regime. The mere reference to electronic means does not make it possible to define the communication channel that will be used, and a wide spectrum of solutions is admissible, from a simple request by email and a response sent by the same route to the establishment of an interoperability system between the areas of Justice and Health.

11. If it is evident that the process until now of requesting by letter and post, followed by making paper copies sent by the same route, is not secure, the solution for requesting and sending by e-mail continues to suffer from the same problems of lack of security, jeopardizing the confidentiality and integrity of the information. It is not even admissible that, nowadays, the circulation of health information by e-mail messages is considered.

12. With the intention of dematerializing the communication channel between the INMLCF, IP and the National Health Service (SNS), it is essential to adopt solutions that meet the security requirements imposed by article 32 of the RGPD.



13. It is, therefore, important that this diploma proceeds with the minimum regulation of the communication mechanism, expressly imposing the adoption of secure channels, the definition of access profiles based on the need to know the information and the implementation of traceability mechanisms , and the specific conditions that will define the processing of personal data can be referred to an administrative regulation - it is recalled that such regulation must be subject to prior consultation of the CNPD, under the terms of paragraph 4 of article 36 of the RGPD.

14. It is only added that, with the adoption of interoperability mechanisms, the period of 30 days foreseen in the project for access to information is clearly excessive, and the information can be received immediately after the request.

III. Conclusion

15. Based on the observations and on the grounds set out above, the CNPD considers that in the Project:

i. In the preamble, the need to comply with the obligations of the personal data protection regime deserves equal attention to the one conferred on medical secrecy and judicial secrecy:

ii. who has access to health information for the exercise of expert functions must be defined, in accordance with the principle of proportionality and, specifically, the need to know; and, in order to maintain the access of INMLCF directors, specify for which exercise of powers such access is legitimate;

iii. the categories of health professionals covered by the new access profile must be defined;

iv. the electronic communication mechanism to be used must be regulated, at least expressly imposing the adoption of secure channels, the definition of access profiles based on the need to know the information and the implementation of traceability mechanisms, which may be referred to administrative regulation the specific conditions that will define the processing of personal data.

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