/ NATIONAL COMMISSION ; DATA PROTECTION

OPINION/2020/149

I. Order

The Director of the Faculty of Medicine of the University of Lisbon submitted, on November 13, 2020, to the National Data Protection Commission (hereinafter CNPD), for an opinion, the Protocol to be signed between that entity, Centro Hospitalar Universitário Lisboa Norte, E.P.E., and the Shared Services of the Ministry of Health, E.P.E. (SPMS).

The CNPD issues an opinion within the scope of its attributions and competences as an independent administrative authority with powers of authority to control the processing of personal data, conferred by subparagraph cj of paragraph 1 of article 57, in conjunction with 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 August, which implements the GDPR in the domestic legal order.

II. appreciation

The Protocol in question regulates the creation and availability by SPMS of a new access profile to the Clinical software for medical students to access personal data relating to health existing at the Centro Hospitalar Universitário Lisboa Norte, E.P.E., in particular, those contained in the clinical records .

In the indictment request, such processing of personal data is justified in "specific informational needs, legitimized by the right to acquire clinical and scientific knowledge inherent to their quality as medical students, whose learning takes place in different and varied ways, given that contact with the patients' privacy is essential". The provisions of paragraph 1 and, in particular, paragraph 4 of article 29 of Law no. 58/2019, of 8 August, as well as, in the text of the Protocol , Article 9(2)(h) of the GDPR.

By not commenting on the need for medical students to know clinical information during their training, the CNPD is, however, unable to follow the conclusion that Article 29(4) of Law No. 58/2019, of 8 August is, per se, a sufficient national legal provision to legitimize access to personal health data contained in clinical records. In fact, what the aforementioned legal provision provides is only an extension of the

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duty of secrecy in relation to personal health data that students have access to. Which is not the same as legitimizing or making access to this personal data lawful. In other words, paragraph 4 of article 29 of Law no. medicine, not regulating the basis of this access and, therefore, not being able to function as a legitimation norm.

The intended legitimation of access to personal health data must therefore be found in another legal support.

But even if it were intended to interpret paragraph 4 of article 29 of Law no. 58/2019, of 8 August, in the sense of implicitly recognizing the possibility of access to personal health data by medical students, always an attempt would have to be made to ensure the conformity of such an interpretation - or of the legal norm thus interpreted - with European Union law, in particular with the GDPR. Article 9(2) of the GDPR is directly relevant there, which, as will be shown below, conditions or undermines such an interpretation. Let's see.

It is important, first of all, to clarify that the interest of medical students in knowing personal health data in the context of their learning is not enough to legitimize access to data that are part of the category of specially protected personal data (cf. Article 6(1) and Article 9(1) GDPR). To that extent, only if any of the conditions provided for in Article 9(2) of the GDPR is met will such treatment be lawful.

Relevant could be point h) to Article 9(2) of the GDPR, as invoked in the text of the Protocol. And there it is important to take into account the provisions of paragraph 3 of article 9, which requires that, for the provision of health care or treatment, the processing of personal data is "carried out by or under the responsibility of a professional subject to the obligation professional secrecy or by another person also subject to an obligation of confidentiality under Union or Member State law,'. In this sequence, the linking, by article 29 of Law No. 58/2019, of August 8, of students to the duty of secrecy could fulfill here the indispensable guarantee for carrying out the processing of personal data necessary for the purpose of providing of health care or treatment.

It so happens that the provision of health care can, under national law, only be provided by health professionals and, when such provision corresponds to medical acts,

can only be ensured by graduates in medicine registered with the Portuguese Medical Association (in parallel, by the way, to what happens with the practice of professional acts in the context of other regulated professions)1. In addition, access to personal data contained in clinical records by students is not strictly necessary for the provision by doctors or other health professionals of health care or treatment. Therefore, this processing of personal data does not meet the requirements set out in the aforementioned point h) of paragraph 2 of article 9 of the GDPR.

In fact, it is not permissible to support a processing of personal data with the declared purpose of promoting teaching and learning in a norm that legitimizes processing of personal data with a different purpose - that of providing health care and treatments; to which is added the fact that access by students is not strictly necessary for the pursuit of the purpose envisaged by subparagraph h) of paragraph 2 of article 9 of the GDPR.

In this way, there is only the possibility of supporting access to personal data relating to health with the consent of the respective holders, under the terms set out in paragraph a) of paragraph 2 of article 9 and in paragraph 11) of article 4. of the GDPR. Thus, only if the patient expresses an explicit, informed, free and specific consent regarding access by one or more medical students for the purpose of learning, that access will be legitimized.

And, when such a hypothesis is verified, paragraph 4 of article 29 of Law no. pronunciation, «a culture of responsibility for students and institutions», hospitals and universities, which the CNPD highlights as very positive in terms of protecting privacy and human dignity. And this appears to be the only interpretation of the provisions of paragraph 4 of article 29 of that law that is in compliance with the GDPR.

Since only on a case-by-case basis - for specific cases of patients who have issued express and specific (and free and informed) consent - students may be given access to patients' personal health data, the provision of a

1 The reference in recitals m) and n) of the Protocol text to the objective of providing medical students with access to health information registered at SClinico Hospitalar «for the purpose of providing health care in the context of of their training" and "access to health data, collected in the context of the provision of health services by medical students".

The profile of automatic access in the Hospital SClínico Hospitalar for medical students, which would allow access to the clinical record of all users of the hospital, reveals itself to be devoid of legal basis and in direct violation of paragraphs a), b)

and c) of n. Article 5(1) as well as Article 9 of the GDPR.

III. Conclusion

1. The CNPD understands that access to health data by medical students through the provision of an automatic access profile at the Hospital SC, which would allow access to the clinical record of all users of the hospital, has no legal basis , once:

The. Article 29(4) of Law No. 58/2019, of 8 August, is limited to providing for the duty of secrecy when medical students access personal health data, not regulating the basis of this access and, therefore, cannot function as a legitimation norm; and

B. Access to personal health data by medical students does not meet the requirements set out in the aforementioned point h) of paragraph 2 of article 9 of the GDPR, since, on the one hand, it is not permissible to support the processing of personal data with the declared purpose of promoting teaching and learning in a norm that legitimizes the processing of personal data with a different purpose - that of providing health care and treatments; on the other hand, access by students is not, strictly speaking, necessary for the pursuit of the purpose that this norm aims to achieve.

2. Therefore, under penalty of violation of paragraphs a), b) and c) of paragraph 1 of article 5 and also of article 9 of the GDPR, access by a medical student or students to personal data for the purpose of learning depends on the explicit, informed, free and specific consent of the patient and, therefore, the provision of this access can only be made on a case-by-case basis.

The parties to the Protocol are informed of this opinion.

Lisbon, December 30, 2020

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Fiíipa Calvão (President, who reported)