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Opinion in relation to the query made by a Department in relation to the retention of data in the Ethical Mailbox System of the Generalitat of Catalonia

A query from the data protection officer (DPD) of a department regarding the retention of data in the Ethical Mailbox System of the Generalitat de Catalunya is presented to the Catalan Data Protection Authority.

In the consultation, it is stated that the Government agreement GOV/96/2020, of July 21, by which the ethical mailboxes of the Code of conduct of senior officials and managerial staff of the Administration of the Generalitat are anonymized and of the entities of its public sector and of the Code of principles and recommended conduct in public procurement, as well as the mailbox of the General Inspectorate of Personnel Services of the Administration of the Generalitat of Catalonia and its public sector, and approve the Regulatory Norms, regulates the operation of the Generalitat's Ethics mailbox.

As he explains, *"during the preparation of the internal circuit for the correct operation of the Ethical Mailbox, the responsible units consult with the Department's DPD what the data retention period within the application would be, taking into account the special characteristics of the information that can arrive this way".*

In this context, it requests the pronouncement of this Authority on the following issues:

"-Is the data retention period of article 24.4 of the LOPDGDD applicable to the ethical mailbox system?

- If it is, would it be possible to extend this retention period by another 3 months in cases that are considered particularly complex, taking into account the regulation of the GOV/ 96/2020 Agreement?"

Having analyzed the query that is not accompanied by other documentation, in accordance with the report of the Legal Counsel, I issue the following opinion:

I

(...)

II

In order to focus the response to the inquiries made by the DPD of the department, in relation to the retention of data in the Ethical Mailbox System of the Generalitat of Catalonia, it must be taken into account that in accordance with Regulation (EU) 2016/679 , of the Parliament and the Council European, of April 27, 2016, General Data Protection Regulation (hereinafter, RGPD) any processing of personal data, understood as *"any operation or set of operations carried out on personal data or sets of personal data, either*

by automated procedures or not, such as collection, registration, organization, structuring, conservation, adaptation or modification, extraction, consultation, use, communication by transmission, dissemination or any other form of enabling access, comparison or interconnection, limitation, deletion or destruction." (article 4.2 RGPD), has submitted to the principles and guarantees established by that Regulation.

Article 5.1.a) of the RGPD establishes that all processing of personal data must be lawful, fair and transparent in relation to the interested party (principle of lawfulness, loyalty and transparency).

In order for a treatment to be lawful, it is necessary to have, at least, a legal basis of those provided for in article 6.1 of the RGPD that legitimizes this treatment, either the consent of the person affected, or any of the other circumstances which provides for the same precept. In the field of public administrations, the legal bases provided for in letters c) and e) of article 6.1 of the RGPD are of particular interest, according to which the treatment will be lawful when it is necessary for the fulfillment of 'a legal obligation applicable to the controller (letter c), or when the treatment is necessary for the fulfillment of a public interest or in the exercise of public powers conferred on the controller (letter e).

As can be seen from Article 6.3 of the RGPD, the legal basis of the treatment indicated in both cases must be established by European Union Law or by the law of the Member States that applies to the person responsible for the treatment. The referral to the legitimate basis established in accordance with the internal law of the member states requires, in the case of the Spanish State, in accordance with article 53 of the Spanish Constitution, that the rule of development, to be about a fundamental right, has the status of law.

In this sense, article 8 of Organic Law 3/2018, of December 5, on Protection of Personal Data and guarantee of digital rights (hereafter LOPDGG) establishes the legal scope of the enabling rule.

In addition to the principle of legality, any data processing must comply with the rest of the principles and guarantees established by the RGPD among which, for the purposes of this opinion, the principle of limiting the retention period should be highlighted, according to which the data should be kept *"in a way that* ***allows the identification of the interested parties for no longer than is necessary for the purposes of personal data processing (...)" (art.*** 5.1.e) RGPD)".

However, the RGPD establishes exceptions in which it is possible to keep and process personal data for longer than necessary to achieve the purpose pursued. The same article 5.1.e) RGPD, introduces by way of the exception, the cases of further processing for purposes *"of archiving in public interest, purposes of scientific or historical investigation or statistical purposes, in accordance with article 89, section 1".* Likewise, article 17.3 provides for exceptions to the right to delete data that are not necessary for the purposes for which they were collected, among others, when *"the treatment is necessary for the fulfillment of a legal obligation that requires the processing of data imposed by the Law of the Union or of the Member States that applies to the person in charge of the treatment, or for the fulfillment of a mission carried out in the public interest or in the exercise of public powers conferred on the person in charge" (article* 17.3.b) and *"when the treatment is necessary for the formulation, exercise or defense of claims" (article* 17.3.e)).

III

The Organic Law 3/2018, of December 5, on the protection of personal data and the guarantee of digital rights (hereinafter LOPDGDD), within Title IV relating to the provisions applicable to specific treatments, regulates the treatments of data carried out in the framework for reporting internal complaints in article 24, which establishes:

"1. It will be lawful to create and maintain information systems through which a private law entity can be made aware, even anonymously, of the commission within it or the performance of third parties who contract with it, of acts or conduct that could be contrary to the general or sectoral regulations that were applicable. Employees and third parties must be informed about the existence of these information systems.

2. Access to the data contained in these systems will be limited exclusively to those, whether or not affiliated with the entity, who carry out internal control and compliance functions, or to those in charge of processing that are eventually designated for that purpose. However, its access by other persons, or even its communication to third parties, will be permitted when it is necessary for the adoption of disciplinary measures or for the processing of the judicial proceedings that, in their case, proceed.

Without prejudice to the notification to the competent authority of facts constituting a criminal or administrative offence, only when the adoption of disciplinary measures against an employee could proceed, said access will be granted to personnel with functions of management and control of human resources.

3. The necessary measures must be taken to preserve the identity and guarantee the confidentiality of the data corresponding to the persons affected by the information provided, especially that of the person who had brought the facts to the knowledge of the entity, in case it had been identified

4. The data of the person making the communication and of the employees and third parties must be kept in the reporting system only for the time necessary to decide on the origin of starting an investigation on the facts reported.

In any case, after three months have passed since the introduction of the data, it must be deleted from the reporting system, unless the purpose of the conservation is to leave evidence of the operation of the crime prevention model by the legal entity. Complaints that have not been acted upon may only be recorded anonymously, without the blocking obligation provided for in article 32 of this organic law being applicable.

After the period mentioned in the previous paragraph, the data may continue to be processed, by the body to which it corresponds, in accordance with section 2 of this article, the investigation of the reported facts, not being kept in the internal reporting information system itself.

5. The principles of the previous sections will be applicable to the internal reporting systems that could be created in the Public Administrations."

Therefore, the LOPDGDD gives legality to the processing of data necessary for the operation of the information systems of internal complaints that have the purpose of bringing to the attention of an entity, *"including anonymously, the commission within the same or in the performance of third parties who contract with it, of acts or conduct that could be contrary to the general or sectoral regulations that were applicable.",* and regulates the principles applicable to these treatments.

With regard to the information systems for internal complaints implemented by public administrations, the LOPDGDD enables them if they adapt their operation to the principles contained in article 24 of this law (art. 24.5).

In accordance with the third section of article 24, the personal data collected by the internal complaints information system must be treated with the exclusive purpose of investigating the reality of the facts reported and processing the corresponding complaints, if applicable . Thus, this section provides that *"the necessary measures must be adopted to preserve the identity and guarantee the confidentiality of the data corresponding to the persons affected by the information provided, especially that of the person who had brought the facts to the knowledge of the entity, in if he had identified himself".*

With regard to the retention period of the data of the people who formulate the communication, and of the employees and third parties, paragraph 4 of article 24 establishes that they must be kept in the complaints system *"only during the essential time to decide on the appropriateness of initiating an investigation into the reported facts"* and, in any case
"After three months have passed since the introduction of the data, it must be deleted from the reporting system. If its conservation were necessary to continue the investigation, they may continue to be treated in a different environment by the body of the entity responsible for said investigation".

This means that this data must be deleted from the information system as soon as it is no longer necessary to decide whether to investigate the facts. Term that, in any case, cannot exceed three months. This does not mean that, in the event that the complaint is considered well-founded and leads to a specific investigation, the data must be deleted from the entity's systems or from the third-party entities responsible for the investigation, but only from the system of information on internal complaints.

This deletion obligation will not affect the case of anonymous or anonymized data, that is to say, when it is not possible to identify, directly or indirectly, the natural persons affected, without disproportionate efforts (art. 24.4).

Likewise, it should be borne in mind that in these cases the blocking of personal data does not proceed but its physical deletion, as provided for in the final section of article 24.4. *"Denunciations that have not been acted upon may only be recorded in anonymized form, without the blocking obligation provided for in article 32 of this organic law being applied."*

III

In the case we are dealing with, the Generalitat de Catalunya regulates the Ethics mailbox of the Generalitat through the Government agreement *GOV/ 96/2020, of July 21, by which the ethics mailboxes of the Code of Conduct for senior officials are anonymized and of the management staff of the Administration of the Generalitat and of its public sector entities and of the Code of principles and recommended conduct in public procurement, as well as the mailbox of the General Inspectorate of Personnel Services of the Administration of the Generalitat of Catalonia and its public sector, and the Regulatory Norms are approved.*

In accordance with the second provision of the Government agreement 96/2020, *"The Ethics Mailbox constitutes an electronic channel that allows any person and any public servant of the Administration of the Generalitat of Catalonia to alert about conduct carried out to the Administration of the Generalitat of Catalonia and its public sector that are or may be contrary to the ethical and conduct rules of the Code of Conduct for senior officials and managerial personnel, of the Code of Principles and Recommended Conduct in Public Procurement and to the law, to the principles of action and to good practices in the field of public service."* And in accordance with the third provision *"The Ethics Mailbox must serve as an ordinary electronic channel so that anyone can alert and communicate facts and actions committed or omitted to the Administration of the Generalitat of Catalonia and its public sector."*

The fifth provision of the Government agreement 96/2020, regulates the confidentiality of the ethical mailbox with regard to the identity of the people who communicate the facts or warning persons, but at the same time regulates the possibility that the person chooses the option to send the alert anonymously.

In this sense, the seventh provision regulates anonymous communications in the ethics mailbox in the following terms: *"the managing body of the Ethics Mailbox must fully guarantee the anonymity of communication in the digital environment through free software or code open that allows you to count on an anonymization network that ensures anonymity throughout the process of processing the communication, in such a way that it hides any data that could allow identification, both of the person communicating the facts and of their computer device connected to the network".*

Therefore, the ethical mailbox can be considered a whistleblowing information system under the terms of article 24 of the LOPDGDD.

Thus, with respect to the first of the questions made in the consultation regarding whether the data retention period of article 24.4 of the LOPDGDD is applicable to the ethical mailbox system, it must be taken into consideration that, as has been explained , the principles of article 24 (art. 24.5) apply to the processing of data in the ethical mailbox, including the limitation of the retention period, so that the data processed in the mailbox ethics must be kept in the system during *"the essential time to decide on the origin of starting an investigation on the facts reported."* This principle would be aligned with the general principle of limiting the retention period provided for in article 5.1.e) RGPD.

On the other hand, in the case of public administrations, the specific period of three months referred to in article 24.4 does not *apply of the complaints system, except that*

the purpose of the conservation is to show evidence of the operation of the crime prevention model by the legal person.") but, in each case, the regulatory norm must determine what is the period necessary to achieve the purpose of the treatment , although this term can be considered as a reference for the determination of the specific term to be applied.

IV

The second of the questions raised in the consultation aims to determine whether, in the event that the three-month retention period provided for in article 24.4 LOPDGDD is applicable, it would be possible to extend this retention period by another 3 months in the cases that are considered particularly complex as provided for in Government Agreement 96/2020.

As has been explained, the data retention period is not part of the regulatory principles of article 24 of the LOPGDD and is therefore not mandatory in the case of information systems for public administration complaints. In the case of Government Agreement 96/2020, provision 9.4 regarding the duration of verification actions establishes:

> *"The verification actions and the communication of the result must take place in the shortest possible time and, as a general rule, in a period that does not exceed three months from the presentation of the communication of the facts in the Ethics Mailbox. This period can be extended up to a total period of six months in justified and expressly motivated cases in the special complexity of the verification of the facts communicated".* (forecast 9.4)

In this context, it is necessary to analyze whether this regulation is in line with the principle of limitation of the data retention period set out in article 24.4 of the LOPDGDD.

As we have seen, article 24.4 of the LOPDGDD establishes that the data of the person formulating the communication and of third parties must be kept in the system for the essential period to determine the origin of starting an investigation into the facts reported, in such a way that, if the initiation of an investigation is agreed upon, the data of the person who made the communication must be deleted from the system, although they may continue to be processed in an information system of the person responsible for treatme *("If its conservation was necessary to continue the investigation, it may continue to be treated in a different environment by the body of the entity responsible for said investigation").*

For its part, provision 9 of the Government agreement 96/2020 refers to the *"verification actions and the communication of the result must take place in the shortest possible time"* and the possibility of extending the time up to 6 months in *"justified and expressly motivated cases in the particular complexity of the verification of the communicated facts".*

As long as the verification actions referred to in provision 9 of the Government agreement consist of the actions necessary to decide on the start of an investigation, this regulation would be in line with article 24 of the LOPGDD and , therefore, as long as it is duly justified and motivated in the special complexity of the actions necessary to decide the start of an investigation, it would be possible to extend the retention period.

Otherwise, that is to say, if the verification or investigation phase has already begun, or the archive has been agreed upon, this extension of the retention period would not comply with the principle of limitation of

data retention period in article 24.4 of the LOPDGDD, unless the data is kept anonymized, that is, when the physical persons affected cannot be identified, directly or indirectly, without disproportionate efforts

Conclusions

The principles set out in article 24 of the LOPGDD and, specifically, for the purposes of the consultation, the principle of limiting the term of data conservation, according to which the data must be kept in the system for the essential time to decide on the origin of starting an investigation, are of application to the processing of personal data of the Ethics Mailbox of the Generalitat of Catalonia. On the other hand, the specific periods provided for in article 24 do not apply. The personal data retention periods provided for in the agreement of Gov/96/2020 are not contrary to the principle of limiting the retention period provided for in the personal data protection regulations.

Barcelona January 26, 2021