apdcat
Autoritat Catalana de Protecció de Dades

Carrer Rosselló, 214, esc. A, 1st 1st
08008 Barcelona

File identification

Archive resolution of the previous information no. IP 295/2019, referring to the Secretary of Penal Measures, Reintegration and Victim Care (SMPRAV) of the Department of Justice of the Generalitat of Catalonia.

Background

1. On 16/10/2017 and 03/11/2017, the Catalan Data Protection Authority received two letters from individual persons, in which they formulated a claim for the alleged neglect of the right to cancel their personal files as inmates of penitentiary centers, which they had previously served before the Secretariat of Penal Measures, Reintegration and Victim Support (SMPRAV) - formerly called the Directorate
General of Penitentiary Services – of the Department of Justice of the Generalitat of Catalonia.

These claims gave rise, respectively, to the rights protection procedures numbers PT 56/2017 and PT 63/2017.

2. On 22/03/2018 (PT 56/2017) and 27/03/2018 (PT 63/2017) the Director of the Authority issued a resolution in which said claims were estimated and required the SMPRAV so that, in both cases, it canceled and blocked the data of the claimants included in their personal files as inmates of
penitentiary centers

3. On 07/27/2018, the Director of the Authority issued two resolutions on the 1st enforcement incident raised in the rights protection procedures numbers PT 56/2017 and PT 63/2017, for which she declared the resolutions of 22/03/2018 (PT 56/2017) and of 27/03/2018 (PT 63/2017) have not been partially implemented. In both resolutions, the SMPRAV was required to certify before the Authority that the necessary measures had been applied in order to make the right of cancellation effective, and specifically, regarding its blocking.

4. On 05/28/2019, the Director of the Authority issued two resolutions on the 2nd incident of enforcement of rights protection procedures numbers PT 56/2017 and PT 63/2017. In the first three points of the dispositive part of both resolutions, the following was indicated:

> *"1.- Declare that the resolutions of this Authority dated 03/22/2018 and 07/27/2018, issued in the framework of the reference guardianship procedure, are considered executed.*

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2.- Warn the Department of Justice that the retention of blocked data for processing with purposes other than the requirement of possible responsibilities derived from processing prior to blocking or its processing for archival purposes in the public interest after 'having canceled and blocked the data, would infringe the regulations on data protection, in accordance with what has been set out in the legal basis 3r.

3.- Request the Department of Justice to, within 10 days from the day after the notification of this resolution, inform the person making the claim about the specific period for blocking the data, of conformity with what has been set forth in the 4th legal basis; and certify it to the Authority."

5. On 06/14/2019 he received the letters of complaint from the claimants, with which they provided a copy of the letter of 06/06/2019 through which the SMPRAV informed them that the period during which the their data would be blocked for 20 years *"from when the blocking resolution is issued and notified".* In this letter, this blocking period was justified in which *"the maximum statute of limitations for crimes is 20 years (art. 131.1 Penal Code)"* and the need to *"guarantee the protection of the rights and freedoms of third parties".*

6. On 10/09/2019 (PT 56/2017) and 04/10/2019 (PT 63/2017), the director of the Authority required the SMPRAV to delete within a maximum period of ten days definitively the personal data included in the penitentiary file of the complainants, both in paper and automated form.

7. By means of letters dated 02/10/2019 and 09/10/2019, the SMPRAV considered that the previous deletion request could not be met for the reasons set out below.

Regarding the paper documentation, the SMPRAV indicated the following:

"(...) the physical destruction of the documentation is governed by the regulations for the application of conservation terms approved by the National Commission for Documentary Access, Evaluation and Selection -CNAATD-, a collegiate body that has as one of the main functions of approving the orders of access and document evaluation tables in which the retention period of the documents of the public administrations of Catalonia and their general access regime are established. It also has the function of controlling the correct application of the access and documentary assessment tables (TAA

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especially in all those processes linked to the destruction of documents.

From this perspective, the request to cancel data from a file does not involve the destruction of the physical file but the taking of certain measures to guarantee the blocking of access by separating this file from the set to enter - it in the Central Archive that keeps the Department's documentation. From the Central Archive, the disposition of the series applies, elimination in accordance with the resolution of the TAAD and/or transfer to historical archives, and the relevant access regime. Therefore, the files subject to data cancellation are not deleted."

And with regard to the deletion of automated data, the SMPRAV noted the following:

"(...) our system is already 25 years old and its rigidity does not allow the deletion of a record without affecting the general structure of the system and other needs of the organization to collect information past in statistical terms. In the course of the next few years, as soon as resources are available, a new information system will be developed with sufficient flexibility and foresight to be able to implement this requirement.

As has already been reported in previous communications, a functionality has been developed in the current rigid system (Sistema d'Informació Penitenciària de Catalunya -SIPC-) which allows the data relating to the name, surname to be replaced by a non-transparent code for users and DNI/ NIE/passport, which are the only ones that can be used to search for people in the SIPC. The data of the interested party has already been pseudonymized and it is impossible to carry out any type of research. Thus, your data is not visible as long as it cannot be searched and we understand that we would respond to the figure of data blocking as long as a system is not developed that, additionally, also enables the deletion of records without compromising the integrity of the database."

8. On 11/11/2019, the Authority opened a preliminary information phase (no. IP 295/2019), in accordance with the provisions of article 7 of Decree 278/1993, of 9 November, on the sanctioning procedure applied to areas of competence of the Generalitat, and article 55.2 of Law 39/2015, of 1 October, on the common administrative procedure of public administrations (henceforth, LPAC), to determine if the facts were likely to motivate the initiation of a sanctioning procedure, the identification of

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the person or persons who could be responsible and the relevant circumstances that occurred.

9. In this information phase, on 12/11/2019 the Department of Justice was required, among others, to indicate whether it had proceeded with its definitive deletion or what was the forecast for its destruction.

10. On 03/12/2019, the Department of Justice responded to the aforementioned request through a letter in which it set out, among others, the following:

- That with respect to the personal files in paper support of the inmates linked to the rights protection procedures numbers PT 56/2017 and PT 63/2017, *"contact has been made through the central archive with the National Access, Evaluation and Selection Commission Documentary (CNAATD) of the DG of Cultural Heritage of the Ministry of Culture, as competent in matters of conservation of the documents of the public bodies of Catalonia, to convey the transmission of the personal files on paper"* of the people making claims in the procedures of rights protection numbers PT 56/2017 and PT 63/2017, *"informing of the requirements of resolutions PT 56 and 63/2017 of the ACPD, for the appropriate purposes."*
- That in relation to the data in automated support incorporated in the SIPC, *"bearing in mind the technical imponderables of the system, which does not allow the elimination of an electronic record without affecting the general structure of the system, and other needs that have the organization of collecting past information in statistical terms, a functionality has been developed in the SIPC that allows users to replace with a non-transparent code, the data relating to the name, surname and DNI/ NIE/ Passport, which are the only ones from of which people can be searched at the SIPC."*
- That the data of those interested in the SIPC, *"have been pseudonymised and it is impossible to carry out any type of research in this regard. Thus, their data are not visible and therefore cannot be searched, understanding that they would remain protected as long as a system is not developed that enables the dissociation and deletion of records without compromising the integrity of the database in the future Information System of Execution Penal (SIEP) which is currently in the development and implementation phase."*
- That in relation *to "whether the non-transparent code, which has been used to replace the name and surnames and the identity documents as research elements, is reversible or not, we inform that in attention to the application of the article 16.3 LOPD regarding the blocking of data, and the interpretation of the term "Global penitentiary and rehabilitation policy" as an integral responsibility of the penitentiary authority that does not conclude when the inmate is released, the non-transparent electronic filter used to replace the research data has been developed with a restricted register of the people with the anonymized data. Exceptionally in the case of prison re-entry or a request for information from a public authority regarding the blocked data, it has*

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provided for the possibility of exclusive access by three individuals in charge of the Directing Centre, through a special access profile not related to the file "Incarcerated population in the prisons of Catalonia". Only these people with special access can reverse the data in the cases established in article 16.3 LOPD."

11. On 07/01/2020, also during this preliminary information phase, the Department of Justice was again requested to, among others, point out the specific offices where the personal files were kept in paper support
of the affected inmates; as well as providing a copy of the communications that the Department had maintained with the CNAATD in relation to the paper files of the affected persons. And, with regard to the information incorporated into the SIPC, the Department of Justice was required to identify the three persons *"individualized Directing Center responsible"* who could reverse the pseudonymization.

12. On 01/22/2020, the Department of Justice responded to the previous request through a letter in which it set out, among others, the following:

- That the *"responsible for the treatment, in accordance with the provisions of article 9 of Law 10/2001 on archives and documentation, remains waiting for the National Commission of Documentary Access, Evaluation and Selection (CNAATD) of the DG of Cultural Heritage of the Conselleria de Cultura, as competent in matters of conservation of the documents of the public bodies of Catalonia, respond to the verbal requests made to them via the central administrative archive of the Department of Justice. Given the classification of public documentation in a permanent semi-active phase by the penitentiary files, from the Central Administrative Archive of the Department of Justice they expressed doubts about how to proceed with the deletion of data when they were informed of the resolution of the "ACPD and in this sense has addressed the corporate manage*
- That the *"personal files of the previously identified inmates, in paper form, are in dependencies outside the penitentiary centers where the data are processed, specifically in the Central Archive of the Department of Justice."*
- That *"from the SMPRAV of the Department of Justice and from the Central Archive, the CNAATD and various officials of the Department of Culture have been verbally contacted without a clear answer having yet been obtained on how to proceed. Given the situation, the data controller has decided to send a request in writing, thus leaving a record of the request and thus promoting a clear statement in this regard. At the same time, the Central Archive has made a written inquiry to its references in the Department of Culture."*
- That access *"to the SIPC can occur from corporate computers with the installation of the software (employee profile) found in the Justice network from a previously authorized physical point (work center profile). "*

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- That the *"data controller declares that he has already exposed the limitations of the information system, that the software has been modified at an extraordinary expense to create the pseudonymization system and that a new system is being developed and implemented of information that is not yet covered by the prison file, but that it will be in the coming years. This new system will have a document manager, unlike the current one."*

- That the *"special access profile not related to the file "Incarcerated population in the prisons of Catalonia" refers to the fact that the functionalities related to data blocking have been implemented independently of the users who already had them responsible, without their permissions relating to their ordinary prison management tasks being affected by the pseudonymization functionalities. Their access has not been removed, because otherwise, in the event of a prison re-entry of any of those affected, it would be impossible for them to retrieve the information on the internal classification criteria and prison security in order to ensure the physical integrity of the internal and professionals; and the evaluation of Riscanvi and rehabilitation and social reinsertion programs applied to achieve the constitutionally established goals."*

In that writing, the three people who could reverse the pseudonymization were identified.

Fundamentals of law

1. In accordance with the provisions of articles 90.1 of the LPAC and 2 of Decree 278/1993, in relation to article 5 of Law 32/2010, of October 1, of the Authority Catalan Data Protection Agency, and article 15 of Decree 48/2003, of February 20, which approves the Statute of the Catalan Data Protection Agency, the director of the Catalan Data Protection Authority.

2. Based on the account of facts that has been set out in the background section, it is necessary to analyze the reported facts that are the subject of this file resolution.

In advance, it should be pointed out that when the affected persons requested the cancellation of their data from the SMPRAV, Organic Law 15/1999, of December 13, on the protection of personal data was in force (in forward, LOPD).

This rule was subsequently repealed by Organic Law 3/2018, of December 5, on the Protection of Personal Data and guarantee of digital rights (hereinafter, LOPDGDD). However, transitional provision 4a of the LOPDGDD provides that the *"treatments subject to Directive (EU) 2016/680 of the European Parliament and of the Council, of April 27, 2016, relating to the protection of natural persons with regard to the processing of personal data by the competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offenses or the execution of*

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criminal sanctions, and the free circulation of the aforementioned data and which repeals Framework Decision 2008/977/ JAI of the Council, continue to be governed by Organic Law 15/1999, of December 13, and in particular the article 22, and its implementing provisions, until the rule that transposes into Spanish law the provisions of the aforementioned directive enters into force."

So things are, the processing of the data of the affected persons that was the subject of cancellation and blocking, which happens to be subject to Directive (EU) 2016/680, continues to be governed by what was established in the old LOPD.

Having established the above, it is appropriate to address the application of the figure of the blocking with respect to the data of the affected persons subject to treatment by the SMPRAV, which were cancelled.

2.1. About the lock.

As explained in the background, on 28/05/2019, the Director of the Authority issued two resolutions on the 2nd incident of execution of the rights protection procedures numbers PT 56/2017 and PT 63/ 2017 In these resolutions it was declared that the Department of Justice had executed the resolutions of 22/03/2018 (PT 56/2017), 27/03/2018 (PT 63/2017) and of 27/07/2018 (PT 56/2017 and PT 63/2017).

And this given that in those resolutions it was considered that the Department of Justice had already certified to have canceled the personal data included in the penitentiary file of the claimants in the rights protection procedures numbers PT 56/2017 and PT 63/ 2017

Indeed, it should be noted that the cancellation does not lead to the definitive deletion of the data, but to its blocking. In this sense, article 16.3 of the LOPD established that it provided that the *"cancellation results in the blocking of the data, and they must only be kept at the disposal of public administrations, judges and courts, for to the attention of the possible responsibilities arising from the treatment, during the limitation period of these responsibilities. Once this term is completed, the deletion must proceed."*

Blocking does not mean that the data controller continues to process the data in the same way. In effect, the blocking means that the personal data that must be canceled or deleted are outside the usual data exploitation circuits and that their access is restricted to a very limited number of users, in the event that is necessary to attend to the eventual responsibilities derived from that

treatment.

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In the present case, the Department of Justice has accredited the blocking of the data of the affected persons, both on paper and in automated support, so that only specific and limited persons could access the blocked data. At this point, it should be noted that access to blocked data can only be motivated by what is provided for in article 16.3 LOPD. By way of example, this means that data that is kept blocked cannot be used (or kept) in the event that the affected person re-enters the prison system.

In this regard, the blocking system of the data processed in automated support employed by the Department of Justice, using a pseudonym for first and last names and ID, may be admitted as long as the conditions that apply to the pseudonym are equivalent to those that must be applied to blocked data. This is a provisionally valid solution until another can be articulated immediately, but the Department of Justice should be informed of the need to implement the technical and organizational measures necessary to comply with the obligations of the data protection regulations, and therefore, to envisage a definitive solution that allows the blocking of data in automated support.

On the other hand, in the framework of the procedure for the protection of rights number PT 63/2017, one of the affected persons provided the certificate of 25/10/2017 issued by the General Directorate of Treatment and Penitentiary Management, dependent on the General Secretariat of Penitentiary Institutions of the Ministry of the Interior, in relation to the cancellation of their data from the Penitentiary Information System (SIP). The affected person contributed that letter for the purposes of certifying that *"with the same data protection law, the General Secretariat of Penitentiary Institutions of Madrid only takes 20 days to cancel them (...) and here after 2 years a few written Penitentiary Institutions are still looking for reasons to keep them. Given that the data protection law be applied in Catalonia with the same firmness and speed as in Madrid."*

Well, in the certificate that was provided it was indicated that the cancellation of the prison records had been ordered *"in accordance with Organic Law 15/99 on the Protection of Personal Data",* a rule that as set forth provides that cancellation results in blocking.

Precisely, the Spanish Data Protection Agency (competent control authority regarding the treatments carried out by the Ministry of the Interior), in the resolutions of claims for the protection of rights referred to the cancellation of the data processed by the General Secretariat of Penitentiary Institutions also affects that *"article 16.3 of the LOPD determines that the cancellation will result in the blocking of data, being kept solely at the disposal of Public Administrations, Judges and Courts, for the*

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attention to the possible responsibilities arising from the treatment, during the prescription period of these. Complido el cito plazo debode procederse a supresión de los mismos" (for all, resolution R/01066/2012 of procedure TD/00062/2012).

And, in accordance with the above, in the cases in which the estimate of the requested guardianship corresponds, the AEPD has required *"to carry out the cancellation and the consequent blocking of the claimant's personal data existing in the files to which reference is made in this resolution."*

That being the case, it must be emphasized that the cancellation does not entail the deletion of the data, but its blocking for the purpose described in article 16.3 LOPD. In turn, it is also necessary to emphasize that, at this point, there is no disparity of criteria between the Authority and the AEPD.

2.2. About the data blocking period.

Having said that, it is necessary to address whether in the present case the data must continue to be blocked and, in particular, during the period invoked by the Department of Justice in the letter of 06/06/2019 addressed to the affected persons, in compliance with the request that was formulated in the dispositive part of the resolutions on the 2nd incident of execution of the rights protection procedures numbers PT 56/2017 and PT 63/2017, which were issued on 05/28/2019.

In that letter, the SMPRAV informed the affected people that the period during which their data would be blocked was 20 years *"from when the blocking resolution is issued and notified".*

In that letter, the SMPRAV justified this blocking period in which *"the maximum statute of limitations for crimes is 20 years (art. 131.1 Penal Code)"* and the need to *"guarantee the protection of the rights and freedoms of third parties".*

The SMPRAV added that *"during this period of time, the judicial bodies can initiate proceedings for alleged criminal acts committed during the time that the ex-inmates have been under the tutelage of the penitentiary administration (either inside a penitentiary center, or during the enjoyment of permits and exits, etc.).*
The penitentiary administration has the obligation to provide information and attend to the demand and information requirements that the judicial, police and governmental authorities direct to the penitentiary administration in the framework of the investigations they are carrying out."

The purpose invoked by the SMPRAV coincided with that pursued by the blockade (article 16.3 LOPD).

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In relation to the blocking period, in the previously identified resolutions of 28/05/2019 (prior to the SMPRAV letter of 06/06/2019), the Authority indicated that *"maintenance of the blocking the eventual commission of a criminal act by the affected person while he was in the penitentiary, which could give rise to the corresponding responsibilities. But it does not seem that this option is applicable in the present case, given that the Department of Justice has not argued that it had occurred*
such circumstance - or some equivalent - during the stay in the penitentiary center of the affected person."

The truth is that, in the present case, there is no indication that the affected persons had committed any crime while they were incarcerated in a penitentiary.

However, it must be admitted that the blocking figure does not require the concurrence of these indicators of responsibility, but refers to the *"possible responsibilities arising from the treatment".* Consequently, even if it is a remote or merely hypothetical possibility, the data must remain blocked until the prescription of any responsibilities arising from the treatment.

In this last sense, contrary to what the SMPRAV set out in its office of 06/06/2019, the calculation of the limitation period for possible responsibilities does not start in the present case *"from the date it is issued and notifies the blocking resolution",* but from the moment when the treatment that may give rise to said responsibilities ended. That is to say, from the moment when the affected people obtained their final freedom, and therefore lost their status as inmates.

As an example, one of the affected persons provided the certificate of final release issued on 30/08/2012 by the SMPRAV, which certified that the *"Date of final release"* was the same 30/08/2012. Consequently, the 20-year retention period for blocked data would start from that date.

In turn, the Department of Justice should be warned that once the aforementioned period has passed, the data must be destroyed definitively. At this point, it should be noted that once the possible responsibilities deriving from the treatment have been prescribed, the purpose of archiving in the public interest would not enable the personal data that had already been blocked to continue to be kept and that would then have to be definitively destroyed . In this regard, the purpose of archiving in the public interest of data that has been blocked as a step prior to its definitive deletion, can only be achieved with the anonymization of the personal data of those affected.

2.3. About blocking for other purposes.

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As already explained, in accordance with article 16.3 of the LOPD, the data can only be kept blocked in order to make them *"available to public administrations, judges and courts, for the 'attention of the possible
responsibilities arising from the treatment, during the limitation period of these responsibilities. Once this term is completed, the deletion must proceed."*

Therefore, it is necessary to warn the Department of Justice again (as was done in the resolutions of 05/28/2019 that resolved the 2nd enforcement incident) that the conservation or use of the blocked data for a purpose other than the attention to the possible responsibilities arising from the processing subject to blocking, would infringe the regulations on personal data protection.

3. In accordance with everything that has been set out in the 2nd legal basis, and given that during the actions carried out in the framework of the previous information it has not been accredited, in relation to the facts that have been addressed in this resolution, no fact that could be constitutive of any of the infractions provided for in the applicable legislation, should be archived.

resolution

Therefore, I resolve:

1. File the actions of prior information number IP 295/2019, relating to the Secretary of Penal Measures, Reintegration and Attention to the Victim of the Department of Justice of the Generalitat of Catalonia.

2. Notify this resolution to the Department of Justice and the affected persons.

3. 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 article 14.3 of Decree 48/2003, of 20 February, which approves the Statute of the Catalan Data Protection Agency, the persons interested parties may file, as an option, an appeal for reinstatement before the director of the Catalan Data Protection Authority, within one month from the day after their notification, in accordance with what provided for in article 123 et seq. of Law 39/2015. You can also
directly file an administrative contentious appeal before the administrative contentious courts, within two months from the day after its

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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 deem appropriate to defend their interests.

The director,