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File identification

Archive resolution of the previous information no. 326/2019, referring to the General Directorate of the Police.

Background

1. On 04/12/2019, the Catalan Data Protection Authority received a letter from a person for which he made a complaint against the General Directorate of Police (hereinafter, DGP), on the grounds of 'an alleged breach of the regulations on the protection of personal data.

In his letter, the complainant stated the following:

- a) That on 07/16/2019 he appeared, accompanied by his lawyer, at a police station of the Generalitat-Mossos d'Esquadra (hereinafter, PG-ME), following a previous request from this body police in order to "take a statement from him".
- b) That he accepted his right not to testify when the PG-ME showed him *"some photographs taken on 03/30/2019 showing that he was the one appearing in them, and attributing to him the alleged commission of a crime of public disorders"*.
- c) That the court provided him with a copy of the police report drawn up by the PG-ME as part of police proceedings no. 42(...). That this certificate included a photograph of him, taken by the PG-ME at the police station on 07/16/2019 when, as stated, he appeared on request of this police force.

In relation to the facts exposed, the complainant complained that, with the capture of his image, the PG-ME had violated the data protection regulations, first of all, for having obtained it *"without his consent as well as no judicial authorization in this respect"*, and, secondly, because at no time was he informed in relation to the treatment of said image.

In order to prove the facts reported, the reporting person provided, together with his writing, the copy of a sheet that would form part of the certificate drawn up by the PG-ME as part of Police Proceedings no. 42(...). In this sheet (page 1 of *"Annex - part 2"*), entitled *"Comparison of the image of Mr. (name of the complainant) with the investigated person"*, the following information is collected:
a) photograph which, as indicated, corresponds to *"Mr. (name of the complainant) when he presented himself at the police station. Image collected on 16.07.2019 at the police station during his appearance"*;
and, b) photograph of *"The investigated on the day of the events. Image collected on 30.03.19 during the rally where the events took place"*.

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2. The Authority opened a preliminary information phase (no. IP 326/2019), in accordance with the provisions of article 7 of Decree 278/1993, of November 9, on the sanctioning procedure of application to the areas of competence of the Generalitat, and article 55.2 of Law 39/2015, of October 1, on the common administrative procedure of public administrations (henceforth, LPAC), to determine whether the facts they were likely to motivate the initiation of a sanctioning procedure, the identification of the person or persons who could be responsible and the relevant circumstances involved.

3. In this information phase, on 08/01/2020 (reiterated on 07/02/2019), the reported entity was required to report on several issues related to the reported events.

4. On 02/18/2020, the DGP responded to the aforementioned request through a letter in which it set out the following:

- That *"the capture and use of the images of the reporting person referred to in your request was carried out as part of a police investigation linked to facts allegedly constituting a crime of public disorder and damage, and for which the proceedings 42(...) were instructed which were delivered to the Court of Inquiry acting as a guard in Barcelona, on July 16, 2019, with a copy to the Public Prosecutor's Office. These police proceedings gave rise to the initiation of the corresponding criminal judicial procedure, so both the images obtained and the treatment to be made of them were reported to the judicial authority"*.
- That, *"in this sense, the capture of the images and their treatment was carried out in compliance with the judicial police functions entrusted to the Mossos d'Esquadra"*.
- That, *"therefore, the assessment of the adequacy and proportionality of this investigative measure solely corresponds to the judicial authority that hears this case, in accordance with the provisions of the Criminal Procedure Law"*.

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.

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As a matter prior to this analysis, and in relation to the last demonstration made by the DGP in his letter, it must be made clear that in accordance with the Statute of Autonomy of Catalonia and the Law 32/2010, this Authority has full powers to decide whether the action of the DGP that has been the subject of a complaint, conforms or not to data protection regulations

Once the above is established, we proceed to analyze the facts that have been the subject of a complaint. As explained in the background, the complainant complained about the capture of his image by the PG-ME when, following a request from the said police force as part of an investigation, he went to a police station. The complainant considers that with the capture of his image - which was incorporated into the police report - the data protection regulations were violated, first of all because his image was captured by the PG ME without having the your consent or judicial authorization; and secondly, because his right to information was not respected in relation to the treatment of said image.

2.1. About capturing the image without consent or judicial authorization.

First of all, it should be noted that it is an uncontroversial fact, because it is stated in the same police report (1st case *in fine*) that the PG-ME proceeded on 07/16/2019 to capture the image of the person making the complaint when she went to the police station, at the request of this police force, as part of an investigation into the alleged commission of a crime of public disorder.

The data treatments carried out by the forces and security bodies for the investigation and prevention of crimes are governed by Directive (EU) 2016/680, of the European Parliament and of the Council, of 27/4, relating to the protection of natural persons with regard to the processing of personal data by the competent authority for the purposes of prevention, investigation, detection or prosecution of criminal offenses or the execution of criminal sanctions, and the free circulation of this data. To the extent that this Directive (EU) 2016/680 has not been transposed into national internal law within the period provided for that purpose (05/06/2018), the provisions of transitional provision 4a of the Organic Law 3/2018, of December 5, on the protection of personal data and guarantee of digital rights (hereinafter, LOPDGDD), which establishes that these treatments will continue to be governed by the Organic Law, of December 13, on the protection of personal data (hereinafter, LOPD), and in particular by article 22, and its development provisions, until the rule that transposes into Spanish law the provisions of the aforementioned directive enters into force.

Article 22 of the aforementioned LOPD, dedicated specifically to the files of the Forces and the Security Forces, foresees the following:

"The collection and processing for police purposes of personal data by the Forces and Security Bodies without the consent of the affected persons are limited to those cases and those categories of data that are necessary for the prevention of a real danger to public security or for the repression of criminal offences, i

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they must be stored in specific files established for this purpose, which must be classified by category depending on the degree of reliability".

The processing of the data carried out by the PG-ME, without the consent of the affected person, will be lawful - under the terms provided for in Directive (EU) 2016/680 - to the extent that it fits the assumptions established in the article 22 of the LOPD, that is, when the treatment is limited "*to those cases and those categories of data that are necessary for the prevention of a real danger to public security or for the repression of criminal offences*".

The consideration that a personal data has been treated for police purposes is therefore crucial, given that this circumstance depends, as has been said, on the applicability of article 22 of the LOPD as a rule that would enable its treatment. In relation to what is to be understood by police purposes, Recommendation nº (87)15 of the Council of Europe, which regulates the use of personal data for police purposes, explains the following in its appendix: *the expression for police purposes includes all the tasks for which the police authorities must act for the prevention and suppression of crime and the maintenance of public order*". Also the wording of article 22.2 of the LOPD clearly defines the concept of data for police purposes: they will be those necessary for the prevention of a real danger to public security or for the repression of criminal offences.

Well, in relation to this, it is necessary to take into account the circumstances in which the controversial image was captured; as well as evidence the status of judicial police held by the PG-ME.

With regard to the circumstances in which the image in question was captured, it should be remembered that the capture was carried out by the PG-ME itself when the person making the complaint here went to the police station to give a statement as part of a investigation for the alleged commission of a crime of public disorder; and this was the image that was included in the certificate drawn up by the PG-ME as part of this investigation.

At this point it is not superfluous to point out that the capture of the controversial image was not done in a private place where the person reporting here could have a certain expectation of privacy, but in a common area of the police station, as evidenced by the fact that in the aforementioned image -taken in a corridor-, other people (those with the pixelated face) appear, apart from the person making the complaint here.

With regard to the status of judicial police held by the PG-ME, it is necessary to highlight the functions entrusted to it, according to current legislation, with regard to the investigation and prevention of criminal offences.

Article 126 of the Spanish Constitution (EC) determines:

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"The judicial police depends on the judges, the courts and the Public Prosecutor's Office in their functions of investigating the crime and discovering and securing the criminal, under the terms established by law".

Article 11.1 of Organic Law 2/1986, of March 13, on security forces and bodies, establishes:

"1. The State Security Forces and Bodies have the mission of protecting the free exercise of rights and freedoms and guaranteeing citizen security through the performance of the following functions:

(...)

g) Investigate crimes in order to discover and arrest the alleged perpetrators, secure the instruments, effects and evidence of the crime, making them available to the competent Judge or Court and draw up the relevant technical and expert reports (...)"

Article 12 of Law 10/1994, of 11 July, on the Police of the Generalitat – Mossos d'Esquadra, explains the following:

"1 The Mossos d'Esquadra Corps, as an ordinary and comprehensive police force, performs the functions that the legal system attributes to the forces and security forces, and, specifically: (...)

third The judicial police functions that correspond to it in accordance with article 13.5 of the Statute of Autonomy and which are established by article 126 of the Constitution, articles 443 and 445 of the Organic Law of the Judiciary and the rest of the procedural legislation in force, without prejudice to those corresponding to the local police. These functions are carried out by means of the ordinary services of the Corps or by means of its organic judicial police units, on its own initiative or at the request of the judicial authorities or the fiscal ministry".

Article 282 of the Criminal Procedure Law states:

"The purpose of the judicial police, and it is the obligation of all those who make it up, to find out the public crimes that are committed in their territory or demarcation; carry out, according to their attributions, the necessary steps to check them and discover the criminals, and collect all the effects, instruments or evidence of the crime that could disappear, to make them available to the judicial authority (...)"

With regard to the interpretation of this precept, the jurisprudential doctrine contained in the Judgment of the Supreme Court dated 06/05/1993 is particularly clarifying, for what is of interest here, a doctrine that remains valid in subsequent judgments issued by the same Supreme Court (for all STS of 01/06/2012).

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"2.º The investigative tasks of the crime committed are aimed at practicing the necessary diligence to check and discover the criminals and collect all the effects, instruments or evidence of the crime, making them available to the judicial authority.

In the development of these functions, surveillance work or observation of places or persons that could be related to the fact that is the object of the investigation can be carried out. These surveillance tasks can be carried out on public roads, focusing on tasks of monitoring or viewing the behavior and conduct of people considered suspicious. To carry out these functions, you can use all kinds of means that allow you to verify the suspected reality and that are suitable for profiling or building evidentiary material that can then be used to make a complaint to the judicial authority.

Mechanical image recording systems are not ruled out and their use must be carried out within the limits set by respect for privacy and the inviolability of the home. The rights established by the Organic Law of May 5, 1982 regulating the civil protection of the right to honor, to personal and family privacy and to one's image, cannot be considered absolutely unlimited. Imperatives of public interest can make certain entries in the field of privacy expressly authorized by law that may be considered legitimate. According to art. 8 of the previously mentioned Organic Law, actions authorized or agreed upon by the competent authority in accordance with the law will not be considered illegitimate intrusions. The art. 282 of the Criminal Prosecution Law authorizes the Police to carry out the necessary investigations to verify the crimes and discover the criminals.

There is no obstacle for investigative work to extend to the capture of the image of suspected persons in a veiled and surreptitious way at the time when it is well-founded that they are committing a criminal act. In the same way that nothing opposes the police officers to follow and observe suspicious persons, without taking any other measure restricting rights, through the visual and direct perception of the actions they carry out on the public road or in any another open space There is no problem in being able to transfer those perceptions to a mechanical image recording instrument that complements and records what happens in the presence of the agents of the authority.

3.º The capture of images is authorized by law in the course of a criminal investigation as long as they are limited to the recording of what happens in public spaces outside the inviolable enclosure of the home where the exercise of privacy takes place.

Therefore, when the location of filming or listening devices invades the restricted space reserved for the privacy of people, it can only be agreed by virtue of a judicial order that constitutes an enabling instrument for the intrusion into a fundamental right. Those means of capturing the image or the sound that film scenes inside the home, taking advantage of the advances and technical possibilities of these recording devices, would not be authorized, without the appropriate judicial permission, even when the capture took place from locations far from the residential area

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Continuing with the judicial police functions, article 547 of Organic Law 6/1985, of July 1, on the judiciary, establishes:

"The function of the judicial police includes the assistance to the courts and tribunals and the public prosecutor's office in the investigation of crimes and in the discovery and securing of criminals. This function falls to all members of the security forces and bodies, when they are required to provide it, whether they depend on the central government or the autonomous communities or local bodies, within the scope of their respective competences. .

And article 549 of this same rule provides that *"the following functions correspond specifically to judicial police units:*

a) Find out about those responsible and the circumstances of the criminal acts and the arrest of the former, and then give an account to the judicial and fiscal authority, in accordance with the provisions of the laws. b) Assist the judicial and fiscal authorities in all the actions they have to do outside their headquarters and require the presence of the police. c) Materially carry out the actions that require the exercise of coercion ordered by the judicial or fiscal authority. d) Guarantee compliance with the orders and resolutions of the judicial or fiscal authority. e) Any others of the same nature in which their cooperation or assistance is necessary ordered by the judicial or fiscal authority".

And in relation to this precept, article 2 of Royal Decree 769/1987, of June 19, on the regulation of the judicial police, establishes that *"members of the forces and security forces, in their functions of judicial police, must carry out the tasks expressed in article 1, at the request of the judicial authority, the Public Prosecutor or their police superiors, or on their own initiative through the latter, in the terms provided for in the following articles" .*

In this same sense, article 4 of the mentioned Royal Decree adds that *"all the components of the forces and security bodies, whatever their nature and dependence, must practice on their own initiative and according to their respective attributions, the first prevention and assurance proceedings so that they have news of the perpetration of the allegedly criminal act, and they must occupy and guard the objects that come from the crime or are related to its execution; they must report it in the legal terms to the judicial or fiscal authority, directly or through the organic units of the judicial police".*

Well, as the Supreme Court declared in its judgment of 01/26/2018, it is repeated jurisprudence of the Constitutional Court (sentences 70/2002, 173/2011 and 115/20013), to consider that articles 11 of the Law organic 2/1986 and 282 of the LECr - transcribed above, *"constitute a specific legal authorization that empowers the police, among other actions, to carry out the necessary diligence for the investigation of the crime and the discovery of the delinquent"*

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In accordance with the regulations and jurisprudence cited, it must be understood that the collection and treatment of the images of the complainant here who carried out the PG-ME was carried out as part of a police investigation, so the legal authorization provided for in article 22.2 of the LOPD would apply (in relation to article 8 of Directive (EU) 2016/680). In summary, in the reported case we would be facing a collection and processing of personal data carried out by the PG-ME which, despite not having had the consent of the affected person, would be expressly enabled by the transcribed precept.

To finish, it must be said that the lack of judicial authorization - which was also reported, together with the lack of consent - does not at all invalidate the concurrence of the explicit legal authorization. The Supreme Court, in the same sentence cited above, has ruled to that effect in the following terms:

"It is not correct to state that any action that negatively affects fundamental rights requires prior judicial authorization. As STC 115/2013, of May 9, explains, there are fundamental rights that include the guarantee of prior judicial authorization so that an interference with them may occur, as is the case of the inviolability of the domicile (art. 18.2 of the Constitution) or the secrecy of communications (art. 18.3). But others, like those of art. 18.1, does not provide for that guarantee, without prejudice to the fact that judicial protection may be requested against its violation.

An interference as clear and obvious as preventive detention, which affects a fundamental right as basic as the right to freedom recognized in art. 17 of the Constitution is not subject to prior judicial authorization. What's more, it can be carried out not only by a public authority but by any person in certain circumstances (art. 490 of the Criminal Prosecution Law). What is established in relation to this interference is a judicial review after the fact ("within the maximum period of seventy-two hours, the detainee must be released or at the disposal of the judicial authority", art. 17.2 of the Constitution) and a summary process so that the illegally detained person is immediately put at judicial disposal (habeas corpus provided for in art. 17.4 of the Constitution).

In the case of the right to one's own image, the need for prior judicial authorization is not foreseen for actions that involve an affectation or limitation of this right, without prejudice to the fact that the affected person can request judicial protection of the same in the face of illegitimate violations".

2.2.- Regarding the right to information.

The complainant complained that the PG-ME would not have complied with his right to information in relation to the capture and subsequent processing of his image.

Article 13 of Directive (EU) 2016/680 explains what information the person in charge of the treatment must make available to the affected persons regarding the treatment

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of your data. But the same precept also provides in its 3rd section, that member states can adopt legislative measures that provide for the possibility of limiting this right:

"3. Member States may adopt legislative measures that delay, limit or omit the making available to the interested party of the information pursuant to section 2 whenever and when said measure constitutes a necessary and proportionate measure in a democratic society, duly taking into account the fundamental rights and legitimate interests of the natural person affected, to: a) prevent investigations, investigations or official or judicial procedures from being obstructed;

b) avoid causing harm to the prevention, detection, investigation or prosecution of criminal offenses or the execution of criminal sanctions; c) protect public security; d) protect national security; e) protect the rights and freedoms of other people".

Well, this possibility of limiting the right to information is expressly provided for in article 24 of the LOPD, a provision still in force until Directive (EU) 2016/680 is transposed, in accordance with the provisions of Additional Provision 14a of the LOPDGDD. Specifically, this precept establishes that information must not be provided when providing such information *"affects National Defence, public security or the prosecution of criminal offences"*.

In the case analyzed here, this Authority believes that the PG-ME, taking into consideration the circumstances in which the image of the person making the complaint was captured - and which have been detailed previously -, did not have the obligation to inform the affected person, given the concurrence of the requirements required by article 24 of the LOPD so that the duty to inform does not operate.

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 326/2019, relating to the Directorate General of the Police.
2. Notify this resolution to the General Directorate of the Police and to the reporting person.

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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 its notification, in accordance with the which provides for article 123 et seq. of Law 39/2015. An administrative contentious appeal can also be filed directly before the administrative contentious courts, within two months from the day after its notification, in accordance with articles 8, 14 and 46 of Law 29/1998 , of July 13, governing the contentious administrative jurisdiction.

Likewise, the interested parties can] file any other appeal they deem appropriate to defend their interests.

The director,