apdcat
Autoritat Catalana de Protecció de Dades

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RESOLUTION of sanctioning procedure no. PS 3/2018, referring to the General Directorate of the Police.

Background

1.- On 31/05/2017 the Catalan Data Protection Authority received a letter from a trade union for which it filed a complaint against the Directorate General of Police (hereinafter, DGP), on the grounds of an alleged breach of Organic Law 15/1999, of December 13, on the protection of personal data (hereinafter, LOPD). Specifically, the complainant union complained about the following two facts: a) that the DGP "required the officials of the Investigation Unit of (...) to submit themselves to a collection of fingerprints, without there being any type of investigation against them, neither judicial nor police, simply in "prospective" mode. No file has been created, it is not known who will have this data, what uses will be given to it, nor has the agents been informed of the rights of access, rectification or opposition"; and, b) that the DGP disclosed the personal data relating to a detained person and his mother, to all "officials of the Investigation Unit" –

whether or not they were related to the arrest-, by sending a letter in which each of the members of the aforementioned Investigation Unit was summoned to carry out a "dactyloscopic review of the prints of the ten fingers of the hands".

The complainant union provided various documentation relating to the facts reported, in particular, the copy of one of the offices that, according to the complainant union, the DGP would have sent to all the members of the Investigation Unit of (...). The following text was included in the said letter:

"Police proceedings number (...)AT All

On January 30, 2017, members of the Internal Affairs Division – Investigation Area Internal, they became aware of some events that occurred in the population of (...)s, on January 25, 2017 where two agents attached to the Investigation Unit of (...) located an anonymous note collected in the mailbox of Mrs. (...), where the personal and private data of three police officials from the Mossos d'Esquadra body assigned to the Investigation Unit of (...) and who arrested the his son Mr. (...).

Once the lophoscopic analysis of the documents under study has been concluded (...) and a series of fingerprints have been revealed, it is necessary for the continuation of the ongoing investigation to be able to compare the fingerprints of all the members of the Research Unit of (...) to be able to rule out or understand the origin of the same.

It is for this reason that this summons is extended so that you appear on June 1, 2017, (...) at the Investigation Unit of (...), in order to carry out a dactyloscopic review of the fingerprints of the ten fingers of the hands. I also inform you that you can carry out the aforementioned diligence assisted by the lawyer of your choice."

At the end of the letter, the name, surname and number were stated. TIP of the person receiving the notification.

2.- The Authority opened a preliminary information phase (no. IP 161/2017), in accordance with article 7 of Decree 278/1993, of November 9, on the sanctioning procedure applied to areas of competence of the Generalitat, and article 55.2 of Law 39/2015, of October 1, of

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common administrative procedure of public administrations (hereinafter, LPAC), in order to determine if the facts were likely to motivate the initiation of a sanctioning procedure, the identification of the person or persons who could be responsible and the relevant concurrent circumstances in each other

As part of this information phase, by means of an official letter dated 06/07/2017, the reported entity was required to report on the following issues:

- Indicate whether, as indicated in the letter that the DGP had directed to the officials of the Investigation Unit of (...) (transcribed in the 1st antecedent), the fingerprints of all the members of said Unit.
- If you answered affirmatively to the preceding question, indicate whether, prior to the collection of fingerprints, the affected persons were informed about the content of article 5.1 of the LOPD, and if so, provide the documentary evidence corresponding to the first three agents whose fingerprints were collected.

- Indicate the people to whom the aforementioned office was addressed and, specifically, indicate whether it was forwarded to all members of the Investigation Unit of (...).
- Set out the reasons that -eventually- would justify the need to include in the aforementioned letter announcing the collection of fingerprints, the identity of an arrested person and his mother.

The DGP responded to the previous request through a letter dated 06/26/2017, which set out, in what is of interest here, the following:

- That "the diligence of collecting fingerprints from members of the Investigation Unit of (...) was done as part of an investigation carried out by the Internal Affairs Division of the DGP under the orders of the Prosecutor's Office of (...) and, therefore, linked to the investigation of alleged criminal acts".
- That "in this sense, it was the aforementioned Prosecutor's Office that required the Internal Affairs Division of the DGP so that, in its functions of judicial police, it practiced this diligence with respect to those agents who voluntarily wanted to cooperate in the investigation, also having to report on those cases that showed their refusal to submit to the said investigative diligence".

- That "in the case of an investigation carried out as a judicial police officer under the auspices of the Prosecutor's Office for being linked to the prosecution of criminal offences, the regulations that apply are the Criminal Procedure Law and the authorization legal provided for in articles 22.2 and 24" of the LOPD.

3.- Given that with the letter of response the DGP did not fully comply with the request made by this Authority, through a letter of 26/06/2017 the DGP was again required to provide the information required and not provided , and likewise, that he provide a copy of the office that the Prosecutor's Office of (...) would have sent to the Division of Internal Affairs of the DGP, by which the said body of the DGP would be required to practice due diligence consisting of subjecting the members of the Investigation Unit of (...) to the collection of their fingerprints.

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The DGP responded to this second request by means of a letter dated 07/14/2017, in which it reported the following:

- That "the Internal Investigation Area (AII) cited and notified the diligence of voluntary collection of fingerprints to each and every one of the agents of the Investigation Unit of (...) ((...)), and the result was that they all provided them voluntarily"
- That "Regarding the reasons that would justify the need to include in these documents the identity of the detained person and his mother, it must be indicated that this information was recorded so that the consent given by the agents was of an informed nature, that is to say, so that the agents who voluntarily wanted to submit to the collection of data knew precisely the purpose for which they were being asked".

- That a copy of "the printed form and the standard voluntary review sheet that were used in these police proceedings was provided. (...). As stated in this documentation, the person who gave his consent to the lophoscopic review was informed that the collection of the data was done for the sole purpose of being able to compare them with the frames related to the specific current investigation that was being carried out carrying out, and solely for these purposes. Therefore, the inclusion in any police file was not reported, given that this data was only processed for the purpose of conducting a comparative study between the doubtful fingerprints contained in the specific investigation and the doubtful fingerprints provided by each officer" .

- That, in relation to the request of the Office of the Prosecutor, "it is necessary to indicate that this investigative diligence and the way to carry it out was agreed by the Chief Prosecutor of (...) in a meeting he held with members of the AII of the Internal Affairs Division of the Directorate General of Police on May 22, 2017".
- That "the diligence of collecting fingerprints (...) was carried out as part of an ongoing police investigation led by the Prosecutor's Office of (...) and, therefore, under its direction , guardianship, protection and supervision. Likewise, once the agent was informed of the purpose for which his fingerprints were being requested, of their voluntary nature and of the fate that would be given to them, none of the agents objected to their collection".

Along with her letter, the DGP provided a copy of the form and the "voluntary review sheet" that she stated would have been given to the police officers whose fingerprints were taken, but neither document was completed. a) The text of the printed model provided contains, apart from the first two paragraphs of the document transcribed in the previous 1st, the following text: "For this reason, the collaboration of the Police officer is requested of the Generalitat –

Mossos d'Esquadra xxxx, holder of the professional card (TIP) number xxxx, in order to carry out his dactyloscopic identification in order to contribute to the successful development of this investigation.

You are also informed that the resulting dactyloscopic identification will only be used for the present investigation and that once compared with the fingerprints obtained, and if not necessary, they will be immediately destroyed.

__ That he consents to be taken by the assigned agent, the prints of the ten fingers of both hands, for the purposes of being compared with the prints found in the documentation that is the subject of this investigation, and in proof of this, I sign this, receiving a copy of this writing.

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__ That he does not want the impressions of the ten fingers of his hands to be taken, and as proof he signs the present, receiving a copy of this writing
(...)"
In this document at the end there were sections intended to collect the signature, among others, of the person whose fingerprints are collected ("Signature of the person declaring").
b) In the "Voluntary review form" of which an uncompleted model was also provided, there is the following warning: "The donor gives his consent to the collection of his lophoscopic review and to be able to compare with the lophograms detected only in relation to this case. Once closed the review will be destroyed".

This document would also include the signature, among others, of the person whose fingerprints are collected.

4.- On 02/08/2018, the director of the Catalan Data Protection Authority agreed to initiate disciplinary proceedings against the DGP, for an alleged serious infringement provided for in article 44.3.d) in relation to the Article 10 of the LOPD. Likewise, he appointed the official of the Catalan Data Protection Authority, (...) as the person instructing the file. This initiation agreement was notified to the imputed entity on 08/02/2018.

In the initiation agreement itself, the reasons why no charges were made with respect to other reported incidents were explained, specifically, in relation to the duty to inform the people whose fingerprints were collected, in accordance with the provisions of article 5 of the LOPD. In this regard, it was determined that in this case the right to information was exempt due to the provisions of article 24 of the LOPD. This precept provides, in its 1st section, an exception to the aforementioned right when the fact of reporting may affect, among others, public safety or the prosecution of criminal offences, as would be the case at hand in which the disputed data they collected as part of an investigation where it was intended to elucidate the commission of a possible crime, in accordance with what the DGP had reported.

In the initiation agreement, the accused entity was granted a term of ten business days from the day following the notification to formulate allegations and propose the practice of evidence that it considered appropriate for the defense of its interests .

5.- The DGP made objections to the initiation agreement by means of a letter dated 02/22/2018. Likewise, the DGP requested a copy of the file, a request that was appreciated and access to said copy was granted.

6.- On 31/05/2016 the person instructing this procedure formulated a resolution proposal, by which he proposed that the director of the Catalan Data Protection Authority declare that the DGP had committed a serious infringement in article 44.3.d), in relation to article 10 OF THE LOPD. This resolution proposal was notified on 04/06/2018, and a period of 10 days was granted to formulate allegations.

7.- By means of a letter dated 06/28/2018, the DGP has formulated allegations to the proposed resolution.

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Of all the actions taken in this procedure, the facts that are detailed below as proven facts are considered proven.

Proven Facts

The General Directorate of the Police, within the framework of police proceedings no. (...)AT AII, referred all members of the Generalitat Police - Mossos d'Esquadra assigned to the Investigation Unit of (...), an office for which they were summoned to appear for on 01/06/2017 in order to carry out a "dactyloscopic review of the prints of the ten fingers of the hands". In the aforementioned writ of summons for the collection of fingerprints, the name and surname of the person arrested in the indicated police proceedings, and also of his mother, were revealed, data which were unnecessary for the purpose pursued with the summons to appear

Fundamentals of Law

1.- The provisions of Law 39/2015, of October 1, on the common administrative procedure of public administrations (hereafter, LPAC), apply to this procedure; as well as in Decree 278/1993, of November 9, on the sanctioning procedure for application to the areas of competence of the Generalitat, as provided for in DT 2ª of Law 32/2010, of October 1, of the Catalan Data Protection Authority. In accordance with articles 5 and 8 of Law 32/2010, the resolution of the sanctioning procedure corresponds to the director of the Catalan Data Protection Authority.

2.- As part of this sanctioning procedure, the accused entity made allegations against the initiation agreement and also against the resolution proposal. The first statement of objections was already analyzed in the resolution proposal formulated by the instructing person, although it is considered appropriate to make a mention of it in the present resolution, given that in the allegations formulated before the resolution proposal those previously formulated before the initiation agreement are reproduced in part. The set of allegations made by the accused entity are then analyzed.

2.1.- On the existence of legal authorization for the disclosure of the controversial data.

The DGP, in its statement of objections to the initiation agreement, invoked the following articles as rules authorizing the disclosure of the disputed data:
- Article 24.2 of the Spanish Constitution, which "establishes that everyone has the right not to testify against himself and not to plead guilty".
- Article 118.1.h) and 520.2.b) of the Criminal Procedure Law which "establish the right of people to whom a punishable act is attributed not to testify against themselves and not to plead guilty".

The DGP admitted that at the time of the collection of the fingerprints of the members of the PG-ME assigned to the Investigation Unit of (...) as part of the police proceedings no.
(...)AT AII, these did not formally have the status of investigated. But he added that "it turns out

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it is difficult to defend that these normative precepts are not applicable if the aforementioned rights are not to be emptied of content". In this sense, the DGP asserts that "it was necessary to guarantee that the cited officials had a precise knowledge of the case for which their fingerprints were requested in order to be able to determine whether they wanted to submit to diligence or not".

In short, the DGP maintained that the revelation, in the framework of police proceedings no. (...)AT AII, of the data relating to a person who had been arrested and his mother to all the agents of the PG-ME who served in the Investigation Unit of (...), was a legitimate action in order to guarantee the agents of the PG-ME whose fingerprints were intended to be collected "the right not to testify about themselves and not to confess guilt". The DGP added that with this action it was also intended to ensure that "the diligence of taking fingerprints could not be declared invalid in the framework of the criminal procedure that could derive from the investigation", since it was necessary to avoid that said diligence "could be questioned due to the fact that the people investigated were not warned of the specific reasons for which they were obtained".

In its statement of objections to the proposed resolution, the DGP insists again on the need to provide this information to each and every one of the members of the Investigation Unit "because of the relevant consequences that could arise of the attitude that the agents took towards the collection of fingerprints, that is to say, and for example, all those people who were not related to the case but refused to hand over the fingerprints because they understood that they were not being sufficiently informed of the facts, they could end up generating indications of guilt that could end up causing them damages and undermining of rights".

Well, as the instructor explained in the resolution proposal, certainly, and to the extent that the fingerprints had been collected in the course of police investigations that could lead to criminal proceedings, the guarantees invoked by the DGP (right not to testify against themselves and not to plead guilty), so these people had to be informed about the circumstances that gave rise to the fingerprint collection diligence in order to that these people (in these cases agents of the PG-ME) could decide whether or not to provide this data as part of the open police investigation.

Having said that, it is a matter of elucidating whether in order to guarantee these rights of the people from whom the data was collected (members of the Investigation Unit) it was necessary to provide each and every one of them with the name and surname of a person who had been arrested and also his mother. Well, as indicated in the proposal, this Authority considers that the disclosure of said data to all the agents of the PG-ME who provided service to the Investigation Unit of (...) was not essential in order to that the people whose data were collected had that relevant information, in order to be able to assess the possible violation of their rights. In effect, the DGP could have limited itself to informing in relation to the case that had originated the said investigation proceedings of the specific circumstances (that two agents of the PG-ME had located in the mailbox of the mother of a person who had been arrested a letter in which he gave information relating to three agents of the PG-ME), so that the

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person or persons who had carried out this action would have been able to clearly identify what the facts were that were being investigated. This Authority considers that the same information would be sufficient in order to guarantee the rights of those agents unrelated to this fact or action that was being investigated, and thus assess whether they should lend themselves to the collection of their fingerprints.

As the instructor explained, even in the denied case that it was considered that the arrested person's data was relevant data in order to identify the facts that gave rise to the effort to collect fingerprints, what is obvious is that for in order to guarantee the constitutional rights of the agents, the identification with the name and surname of the mother of the person who had been arrested was not at all necessary, no matter how much the note that originated the investigations was found in her mailbox. Thus, in its action the DGP did not only have to ensure the rights of the agents, but also had to protect the fundamental rights of these people whose identity was revealed, and in particular, their right to the protection of personal data.

Regarding this weighting between the various rights and/or interests at stake, the DGP in its letter of allegations to the initiation agreement asserted that "the legal assets at stake were weighed and it was concluded that the right to the protection of the data of the affected persons had to give way to other legal assets at stake", and considered that "the undermining of the rights of the two affected persons was provided in relation to the fundamental rights of the persons cited who wanted to be assured. In this sense, it should be noted that the only personal data included in the subpoena were the names and surnames and no other data (the data communicated were adequate, relevant and limited to what was necessary)." The DGP insists on the same issue in its statement of objections to the proposal, considering that the measure was necessary, suitable and "caused more benefits or advantages for the general interest than harm to other goods or values in conflict ".

In order to determine whether the treatment of these personal data complies with this principle of data quality -consecrated in article 4 of the LOPD-, it is appropriate to invoke the jurisprudential doctrine (for all, the Judgment of the Supreme Court of 02 /07/2007 and the Interlocutory Order of the Constitutional Court of 26/02/2007), which establishes a series of requirements in order to check whether a restrictive measure of a fundamental right, such as the right to the protection of personal data , is respectful of the principle of proportionality.
In this sense, the jurisprudence points out that in order for a measure to be considered proportional it must meet three requirements: a) that it is necessary, in the sense that there is no other more moderate one for the achievement of this purpose with the same effectiveness (judgment of necessity); b) that it is capable of achieving the proposed objective (judgment of suitability); and, c) that more benefits or advantages are derived from it for the general interest than damages on other goods or values in conflict (judgment of proportionality in the strict sense).

In the case at hand, it must be concluded that the processing of personal data relating to a detained person and his mother in the context examined here constituted an appropriate measure, given that it was used to identify the case in relation with which the fingerprints of the agents were collected, so that they could assess the convenience or not of

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facilitate them But, on the other hand, it was neither a necessary nor proportionate measure since, as has been said, there was another way to fulfill this objective without the need to reveal the names and surnames of the people affected; in other words, it warns of the existence of a less expensive action for the fundamental right to data protection and with which the same result would have been obtained.

2.2..- About the scope of dissemination of personal data.

The DGP stated in its statement of objections to the initiation agreement that the dissemination of the data had a very limited scope, given that only “officials to whom the police investigations were directed” had access. who, in addition, are "people particularly aware of the obligation to keep strict secrecy regarding all the information they know because of their professional functions and that the data provided was related to their activity as members of the PG- ME".

As the instructor stated, the fact that the people who finally access information are, as public officials, subject to the duty of secrecy in relation to the information they know because of their position, is not a circumstance that validates indiscriminate disclosure to these people of information to which it is not necessary for them to access, as is the case at hand.

In this sense, the judgment of the Supreme Court of 11/13/2012 is of interest, which ruled as follows:

"Knowledge of information that by its nature is reserved must be limited to those people within the organization who need it for the correct development of their mission. To maintain otherwise would lead to defrauding the meaning of the rule, since giving knowledge of specially protected data by all persons at the service of an organization is equivalent to renouncing secrecy.

Applying what has just been said to the present case, only the affected doctors needed to know the identity of the patients to whom methadone was to be supplied, so the fixing of the list on a notice board visible to more people meant -
regardless of the fact that they were at the Service of the Health Center - a violation of the guarantee of confidentiality on health-related data”.

In accordance with what has been explained, it is estimated that the allegations made by the DGP in the present procedure cannot succeed.

3.- In relation to the facts described in the proven facts section, relating to the duty of secrecy, it is necessary to refer to article 10 of the LOPD, which provides for the following:
"The person in charge of the file and those who intervene in any phase of the processing of personal data are obliged to professional secrecy with regard to the data and the duty to save them, obligations that remain even after the end of their relations with the owner of the file or, where appropriate, with its manager."

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Well, as the instructing person indicated, during the processing of this procedure the fact described in the proven facts section, which is constitutive of the serious infringement provided for in article 44.3.d) has been duly proven of the LOPD, which typifies as such:
"d) The violation of the duty to keep secret about the processing of personal data referred to in article 10 of this Law."

It is worth saying that in the processing of this procedure, the eventual application to the present case of the provisions of Regulation (EU) 2016/679 of the European Parliament and of the Council, of 27/4, relating to the protection of natural persons regarding the processing of personal data and the free movement thereof (RGPD). And as a result of this analysis, it is concluded that the eventual application of the RGPD would not alter the legal qualification that is made here, and specifically would not favor the data controller.

4.- Article 21 of Law 32/2010, in line with article 46 of the LOPD, provides that when the infractions are committed by a public administration, the resolution declaring the commission of an infraction must to establish the measures to be adopted so that the effects of the infringement cease or are corrected. In the present case, as explained by the instructor, the adoption of any corrective measure is not appropriate, given that it is an isolated and specific event, which would have consummated the effects of the infringement.

Making use of the powers conferred on me by article 15 of Decree 278/1993, of November 9, on the sanctioning procedure applied to the areas of competence of the Government of Catalonia,

RESOLVED

First.- Declare that the General Directorate of the Police has committed a serious infraction provided for in article 44.3.d) in relation to article 10 of the LOPD, without it being necessary to require corrective measures to correct the effects of the infraction in accordance with what has been set out in the 4th legal basis.

Second.- Notify this resolution to the General Directorate of the Police

Third.- Communicate this resolution to the Ombudsman, by means of its literal transfer, as specified in the 3rd Agreement of the Collaboration Agreement between the Ombudsman of Catalonia and the Catalan Data Protection Agency dated 23 /06/2006.

Fourth.- Order the publication of the Resolution on the Authority's website (www.apd.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 articles 26.2 of Law 32/2010, of October 1, of the Catalan Data Protection Authority and 14.3 of Decree 48/2003, of 20 February, by which the Statute of the Catalan Data Protection Agency is approved, the imputed entity can file, on an optional basis, an appeal for reinstatement before the director of the Catalan Data Protection Authority, within one month from

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the day after its notification, in accordance with the provisions of article 123 et seq. of the LPAC or you can file an administrative appeal directly before the Courts of Administrative Disputes, within two months from the day after its notification, in accordance with articles 8, 14 and 46 of Law 29/1998, of July 13, regulating the administrative contentious jurisdiction. If the imputed entity expresses to the Authority its intention to file an administrative contentious appeal against the final administrative decision, the decision will be provisionally suspended under the terms provided for in article 90.3 of the LPAC.

Likewise, the imputed entity may file any other appeal it deems appropriate for the defense of its interests.

The director

M. Àngels Barbarà and Fondevila

Barcelona, (on the date of the electronic signature)