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RESOLUTION DISMISSING sanctioning procedure no. PS 4/2018, referring to the General Directorate of the Police of the Department of the Interior of the Generalitat of Catalonia.

Background

1.- On 07/12/2017 the Catalan Data Protection Authority received a letter from a person for which he was filing a complaint against the General Directorate of Police of the Department of the Interior (hereinafter, DGP) , due to an alleged breach of Organic Law 15/1999, of December 13, on the protection of personal data (hereinafter, LOPD). The complainant (identified in the initiation agreement) stated that the Police of the Generalitat-Mossos d'Esquadra (hereinafter, PG-ME), had carried out several actions - linked to a judicial procedure substantiated before the Court of Inquiry no. 21 of Barcelona - which could contravene the LOPD, specifically: a) That agents of the PG-ME would have notified in an "open envelope" the judicial documents DOC 1, DOC 2 and DOC 3 (of which he provided a copy and are detailed later), so that third parties had access to its content. b) That these same documents would have been notified by agents of the PG-ME, at addresses that did not correspond to the one that the complainant had expressly indicated to the Court for notification purposes (in the case of DOC 1 and DOC 3 were notified to an address in Vendrell; and, in the case of DOC2, to a hotel in Lleida). The complainant pointed out that, although he had initially indicated to the Court Vendrell's address for the purposes of notifications, on 07/29/2015 he had submitted a letter to the Court in order to provide a new address for the purposes of notifications, specifically the domicile of its legal representation.

In order to substantiate the facts reported, the reporting person provided a copy of the following documentation:

- DOC 1. Judicial summons addressed to the person making the complaint, where the Vendrell's address is stated. The document does not include the date on which the notification was made - which, according to the complainant, would have occurred on 02/03/2016 - but it does include the signature and TIP of the agent who will deliver the notification, as well as the signature and ID of the person who received the notification - according to the reporting person, their mother. In this document entitled "N07 Notification of judicial summons", which contains the header of the DGP, the following information is included: Court issuing the order; type of procedure; Identifier; data of the Instructor unit; name, surname, date of birth, affiliation, no. DNI and address of the person cited - and herein complainant -; time and date of appearance. In this document, there are some boxes that can be marked (even though they are not in the document provided) in order to indicate whether the person cited must appear in the corresponding Court as a witness, reporting person or reported person as the alleged perpetrator of a crime or misdemeanor. In the section of "Person who receives the notification" there is the annotation "PO", followed by a handwritten signature in which you can read a surname that matches the middle name of the complainant here.

- DOC 2. Judicial resolution of 31/03/2017 referring to the person making the complaint here. This document does not include the identity of the person who collected the notification - which according to the

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The complainant was an employee of a hotel in Lleida where she was staying - but it does include the day and time it was notified and the signature of the notifying agent. This document contains data relating to the person making the complaint, among others, who had been convicted in criminal proceedings, who had not paid the amount of the fine and compensation (120 euros and 40.97 euros, respectively), that it had not been possible to seize property, that it was declared insolvent, and that the PG-ME was served with the order to proceed with its arrest in the event of failure to pay the fine and compensation cited.

- DOC 3. The same judicial resolution indicated in the previous point. This document does not include the identification of the person who received the notification - who, according to the reporting person, would have been his mother -; but yes the day and time when the notification was made, as well as the signature and the number. TIP of the notifying agent.

2.- The Authority opened a preliminary information phase (no. IP 377/2017), 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, on the common administrative procedure of public administrations (hereafter, LPAC), in order to determine whether the facts were susceptible to motivate the initiation of a sanctioning procedure, the identification of the person or persons who could be responsible and the relevant circumstances concurrent with each other.

As part of this information phase, by means of an official letter dated 12/18/2017, the DGP was required to comply with the following:

a) Report if the DGP has established a protocol with the administration of justice regarding the delivery of judicial notifications made by agents of the PG-ME. If so, he was required to provide a copy.

b) Set out the reasons that would justify agents of the PG-ME in person - always according to the person making the complaint - at the addresses and dates indicated in the 1st precedent (that of the mother of the person making the complaint - in relation to the documents DOC 1 and DOC 3-; and that of a hotel in Lleida where he was staying -in relation to DOC 2-), in order to notify him of judicial proceedings when, according to the complainant, he had indicated to the Court where the procedures were processed at another address - that of their legal representation - for notification purposes.

c) Indicate through which means the PG-ME would have obtained the address of the Vendrell where documents DOC 1 and DOC 3 were notified. In particular, specify whether this address had been provided by the Court, or whether it get the PG-ME from their own databases, etc. And documented the origin of the information.

d) Set out in detail what was the procedure followed to notify here denouncing the documents to which reference has been made. In the event that, as indicated by the complainant here, the judicial documents are released in an "open envelope", please inform me if this is a common practice of the agents of the PG-ME regarding judicial notifications, and in any case, if it is done thus following the instructions of the corresponding judicial body.

e) In relation to DOC 1, referring to the “Notification of judicial subpoena” with DGP letterhead, inform if this responds to a standard form and, if so, indicate:

e.1. Whether the standard form had been prepared by the DGP in collaboration with the administration of justice or only by the DGP.

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e.2. If the fields of the standard form are completed ad hoc by the police unit of the corresponding PG-ME.

e.3. The reasons that would justify it being included in the standard form, not just the name, surname and address of the person cited, but also the full ID, the details of the court issuing the order, the details of the judicial procedure, in which capacity they appear, etc.; taking into account that from the reported facts it is inferred that this summons can be delivered - without a sealed envelope - to a person other than the one cited, as is clear from the same indication that appears on the form, in the sense that it can be signed by the "person who receives the notification", who could be a person other than the person cited.

3.- Once the 10-day period granted to the DGP has been exceeded without it having complied with the aforementioned information requirement, by means of a letter dated 01/12/2018, notified on that same day, the Authority will again reiterate the first request for information made on 18/12/2017, so that within 5 days from the day following the receipt of this office it complies with it, with the warning that, in the event that if he gave an answer, he could incur the serious infringement typified in article 44.3.i) of the LOPD, for not providing this Authority with the required information.

The deadline granted in this last office of 12/01/2018, in which the request made on 18/12/2017 was reiterated, was exceeded without having received any response from the DGP.

4.- On 29/01/2018, the complainant informed the Authority that the name of the hotel in Lleida where the PG-ME had tried to notify him was (...).

5.- On 08/02/2018 the director of the Catalan Data Protection Authority agreed to initiate disciplinary proceedings against the DGP, firstly, for an alleged very serious infringement provided for in article 44.4.b) in relationship with article 4.1 and 7.5 of the LOPD; and secondly, for an alleged serious infringement provided for in article 44.3.c) in relation to article 4.3 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 imputation was made regarding the reported facts relating to the notification of DOC 1 were explained. In this regard, it was set out in the section on reported facts not imputed of the initiation agreement as follows:

"The facts also reported relating to the notification of DOC 1 (notification in an "open envelope" and notification to an incorrect address), could be constitutive of the serious violations provided for in articles 44.3.d) of the LOPD (in relation to article 10, regarding notification "in an open envelope") and 44.3.c) of the LOPD (in relation to article 4.3, regarding notification to an incorrect address). However, given the time that has passed since those data treatments, the eventual liability that the DGP could have incurred would have already expired for having exceeded the limitation period provided for in article 47 of the LOPD, which sets a two-year statute of limitations for serious infractions, which had almost run out when the complaint was made to this Authority.

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Article 89 of the LPAC, in accordance with articles 10.2 and 20.1 of Decree 278/1993, provides that the filing of the proceedings shall proceed when the following is made clear in the instruction of the procedure: "e) When it is concluded , at any time, that the offense has prescribed".

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 .

6.- The DGP made objections to the initiation agreement by means of a letter dated 02/28/2018, along with which it provided various documentation. Likewise, the DGP requested a copy of the file, a request that was appreciated and access to said copy was granted.

7.- Faced with the allegations made in the initiation agreement by the DGP, the instructing person ordered the opening of a trial period.

8.- On 13/06/2018, 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 very serious infringement provided for in article 44.4.b), in relation to articles 4.1 and 7.5, all of them of the LOPD. In this same proposal, in view of the allegations made by the DGP in the initiation agreement and the test carried out, it was decided not to maintain some of the imputations made in the initiation agreement for the reasons that then they are exposed:

8.1.- Regarding the access by an unidentified person (hotel worker (...)) to the complainant's data contained in DOC 2, it was decided not to maintain the imputation based on the right to the presumption of non-existence of administrative responsibility until the contrary is proven (art. 53.2.b Law 39/2015, of October 1, of the common administrative procedure of public administrations (hereinafter, LPAC).

Thus, in relation to the circumstances in which the notification of said DOC 2 was carried out, the DGP in its statement of objections informed that "it was carried out by delivering this document directly to the requested person, that is to say , to Mrs. (name of the complainant) who identified herself through her national identity document (DNI)"; a statement that was corroborated during the trial phase through the contribution of the testimony of the acting agents, who ratified that the notification and delivery of the DOC 2 was made directly to the person here denouncing prior identification through the DNI.

8.2.- With regard to the notification at a different address to that which the complainant had expressly indicated to the Court for the purposes of notifications.

8.2.1.- In relation to the notification of the DOC 2 to a hotel where the complainant was staying, it was decided not to maintain the imputation and to consider in accordance with the data protection regulations to use in the present case the information contained in the SIP Hotels file in order to notify the reporting person, given the nature of the judicial decision that was made

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to notify the person making the complaint, which contained a dispositive part that included the possible imprisonment of the complainant for subsidiary personal responsibility for non-payment of a fine.

8.2.2.- In relation to the notification of DOC 2 to an address in the town of El Vendrell different from the address that the complainant had previously indicated to the Court for notification purposes, it was decided not to maintain the imputation to the view of the documentation provided by the DGP in the trial phase, consisting of two requests from the said Court –
of dates 03/31/2017 and 04/18/2017 - directed to the PG-ME so that this body could practice the corresponding notification, in which it is stated in the "domicile or whereabouts" section, to an address in the locality from El Vendrell. This documentation showed, therefore, that the PG-ME limited itself to following the instructions provided by the Court of Inquiry regarding the notification to an address in El Vendrell, so it was not required of the DGP any administrative responsibility in relation to this specific event.

This resolution proposal was notified on 06/19/2018, and a period of 10 days was granted to formulate allegations.

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

Proven Facts

On 09/05/2017 the DGP delivered by hand and without a sealed envelope to the mother of the complainant a judicial resolution dated 31/03/2017 that contained the data relating to the person here complaining indicated in DOC 3 of the 1st antecedent, which led to access to the content of the aforementioned document. As indicated in the antecedents, the controversial document delivered to a third person, consisted of the judicial resolution of 31/03/2017 referring to the person making the complaint here, and in which his identification data is contained, as well as the fact that he had been convicted in criminal proceedings, which had not paid the amount of the fine and compensation (120 euros and 40.97 euros, respectively), which had not been able to seize property, which was declared insolvent.

Fundamentals of Law

1.- The provisions of Decree 278/1993, of November 9, on the sanctioning procedure applicable to areas of competence of the Generalitat, are applicable to this procedure, as provided for in DT 2ª of Law 32/2010, of October 1, by the Catalan Data Protection Authority. This resolution proposal is formulated in accordance with article 13
of Decree 278/1993, which attributes this power to the instructor of the procedure. With regard to the competence to dictate the resolution of the sanctioning procedure, in accordance with articles 5.k) and 8.2.j) of Law 32/2010, it corresponds to the director of the Catalan Data Protection Authority.

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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.

In relation to the notification of DOC 3 - addressed to the person making the complaint - in an envelope addressed to the mother of the person making the complaint, the DGP in its statement of objections to the initiation agreement alleged the existence of a legal authorization that would protect this action. In this sense, he invoked the following articles of the Criminal Procedure Law (hereafter, LECr):

Article 170

"The notification consists of the complete reading of the resolution that must be notified and the delivery of the copy of the certificate to the person notified, and the delivery must be recorded by means of a succinct diligence at the foot of the original certificate".

Article 171

"In the diligence, the day and time of delivery must be noted, and it must be signed by the person to whom the notification is made and the official who carries it out (...)".

Article 172

"When the person to whom notification is to be notified is not at home during the first search, whatever the cause and length of absence, the certificate must be delivered to the relative, family member or servant, over fourteen years of age, who is at the address mentioned. If no one is there, the delivery must be made to one of the nearest neighbors".

Article 173

"In the diligence of delivery it is necessary to record the obligation of whoever receives the copy of the certificate to deliver it to the person to whom the notification must be made as soon as he returns to his address, under the penalty of 25 to 200 pesetas if he stops delivering it there".

The DGP added that "notifying this interlocutory in a different way than that established in the LECRIM could lead to defects in the practice of this communication which could imply that its validity is questioned in the framework of the criminal procedure" , in accordance with what is provided for in article 180 LECr ("Notifications, summonses by certain date and summonses by term that are not practiced in accordance with the provisions of this chapter are void").

Indeed, the instructor already made it clear in the proposal that, as alleged by the DGP, article 170 LECr establishes that a copy of the certificate must be given to whoever is notified and the its delivery through a succinct diligence at the foot of the original certificate. But he also pointed out that, in terms of the practice of notifications, there was
to be, not only what is prescribed by the precepts of the LECr previously transcribed, but also what is determined by article 166 of the same rule, a precept that, it should be noted, was subject to modification by Law 13/2009, of November 3, unlike transcripts 170 et seq. of the LECr which retain their original wording.

"The acts of communication must be done under the direction of the court clerk.

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Notifications, fixed-day summonses and fixed-term summonses that are served outside the courts or tribunal must be made by the relevant official. When the court clerk deems it appropriate, they can be sent by certified mail with proof of receipt; the secretary must certify the actions of the contents of the envelope sent, and the proof of receipt must be attached.

Notifications, summonses by certain date and term summonses must be practiced in the form provided for in Chapter V of Title V of Book I of the Civil Procedure Law. (...)"

Article 149 of Law 1/2000, of January 7, on civil proceedings (hereafter, LEC) establishes that "notifications, when their purpose is to give notice of a resolution or action" are procedural acts of communication , specifying in article 152.3.3a that one of the forms through which notifications can be made is by "delivering to the addressee a literal copy of the resolution that must be notified, of the request that the court or the court clerk addresses him, or from the summons certificate or term summons". And article 161 of the LEC regulates in detail the "communication by means of a copy of the resolution or certificate", establishing the following:

"1. The delivery to the addressee of the communication of the copy of the resolution or certificate must be made at the seat of the court or at the domicile of the person who must be notified, required, summoned or within the deadline, without prejudice to what provides for the scope of the execution. The delivery must be documented by means of a deed that must be signed by the official or attorney who makes it and by the person to whom it is made, whose name must be recorded 2. (...)

3. If the domicile where the communication is intended to be carried out is the place where the addressee is domiciled according to the municipal register, or for tax purposes, or according to the official register or publications of professional associations, or is the home or premises leased to the defendant, and the addressee is not there, delivery can be made, in a sealed envelope, to any employee, family member or person with whom he lives, older than fourteen years, who is in that place, or to caretaker of the estate, if he has one, and must warn the recipient that he is obliged to deliver the copy of the resolution or certificate to the recipient thereof, or to notify him, if he knows its whereabouts, and to warn the recipient in any case of his responsibility in relation to the protection of the recipient's data (...)

The name of the recipient of the communication and the date and time when it was searched and not found at its address, as well as the name of the person who receives the copy of the resolution or certificate and the relationship of this person to the addressee; the communication carried out in this way produces all its effects".

In its statement of objections to the proposed resolution, the DGP maintains that "the process of notification of the interlocutory object of controversy is completely regulated by the LECRIM, which is the special rule that regulates the processing of proceedings of the criminal jurisdiction. In these circumstances, when the examiner of the case explains that the PG-ME had to apply the provisions of the Civil Procedure Law, she does not take into account that this rule can only be applied on a supplementary basis (art. 4 LEC) , a circumstance that will not be possible in the present case since the way in which it had to proceed is perfectly and completely regulated in the LECRIM".

Article 4 of the LEC invoked by the DGP stipulates the following:

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"Supplementary character of the Law of civil
proceedings In the absence of provisions in the laws that regulate criminal processes, administrative, labor and military disputes, the precepts of this Law are applicable to all of them".

Contrary to what the DGP argues, and with regard to the practice of notifications, we are not here in a case of supplementary application of the LEC, but it is the LECr itself that determines in its article 166 of what form the notifications must be made, referring expressly to that effect to what is provided for in the LEC. It is therefore a case of express referral in which a normative text - in this case the LECr - refers to another - the LEC - in such a way that its content must be considered as part of the articulated of the referral rule. And in this case, this direct and non-additional application is even more evident, if not at all, when, as has been said, this article 166 of the LECr was expressly modified by Law 13/2009 to introduce, among others, this remission

Subsequently, the DGP, in its statement of objections to the proposal, states that "in the unlikely event that there had been an infringement of the regulations on the protection of personal data in the notification to the mother of the accused , it should be indicated that the DGP would not be responsible". The DGP bases this lack of responsibility, in essence, on the fact that whoever "leads the acts of communication that are entrusted to the members of the PG-ME in the framework of a criminal procedure is the lawyer of the administration of justice (judicial secretary) who determines how these proceedings must be carried out (...) the members of the PG-ME act in this area as mere commissioners of the judiciary and, in this sense, if the APDCAT considers that the way in which these communications are carried out must be changed, it must be addressed to the bodies of these powers that issue them and that are the ones that determine their execution". In this regard, the DGP adds that "both the LECRIM and the LEC (art. 166 LECRIM and 160 LEC) establish that it is up to the lawyer of the administration of justice to certify the contents of the envelopes in those cases in which the acts of communication must be made in a sealed envelope. Thus, this General Directorate understands that it is not possible for the members of the PG-ME to make notifications by entering the document to be notified in an envelope themselves if the person to whom the communication is finally delivered is not the person concerned".

First of all, it should be clarified that the statement of the DGP regarding that "both the LECRIM and the LEC (art. 166 LECRIM and 160 LEC) establish that it is up to the lawyer of the administration of justice to certify the contents of the envelopes in those cases in which the acts of communication must be carried out in a sealed envelope", is provided for in the mentioned rules
only as regards the sending by certified mail of the acts of communication,

Having said that, the truth is that one cannot fail to notice a certain incongruity between what they have articles 170 et seq. of the LECr invoked by the DGP (as an example, what is provided for in article 170 when it states that "the notification consists of the complete reading of the resolution that must be notified") and the to article 161 of the LEC (notification in sealed envelope to third parties) to which article 166 of the LECr expressly refers, as has been said. To this circumstance must also be added the fact that, as the DGP explains, it is the Judicial Secretary under whose direction the acts of communication are carried out. As things stand, it is considered that it is not appropriate to maintain this imputation.

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In view of all the above, it would have been advisable that between the judicial bodies and the DGP a protocol or equivalent instrument had been formalized in order to provide for the manner in which certain situations that may arise as part of the collaboration provided by the PG-ME body to the judicial bodies must be resolved, such as is in the analyzed case. In the absence of this instrument, and in order to comply with the regulations, it is recommended to the DGP that when the notifications are delivered to third parties, they do so in a sealed envelope. And if the DGP considers that this way of acting - introducing the act to be notified "of its own motion" in an envelope, without the knowledge of the court - would involve a procedural defect, as can be seen from its allegations, which the PG-ME should do is to inform the court of the absence of the person to whom it had to be notified so that the court clerk gives new express instructions on how to carry out said notification to third parties , in view of the provisions of the aforementioned articles.

3.- Decree 278/1993, of November 9, on the sanctioning procedure applied to the areas of competence of the Generalitat, provides in article 20:

"1. Dismissal is appropriate: a) When the facts do not constitute an administrative infraction. b) When there are no rational indications that the facts that have been the cause of the initiation of the procedure have occurred.
c) When the existence of responsibility has not been proven, or its extinction has occurred.
If the procedure is directed against a plurality of people, the dismissal resolution only affects those in whom the aforementioned circumstances concur.
2. For the purposes of what is established in the previous section, the termination of responsibility occurs, in any case, by the prescription of the infringement."

Article 10.2 of Decree 278/1993, of November 9, on the sanctioning procedure applied to the areas of competence of the Generalitat, provides that:

"(...) no charge sheet will be drawn up and the case file and the archive of the actions will be ordered to be dismissed when, from the proceedings and the tests carried out, it is proven that there is no infringement or responsibility. This resolution will be notified to the interested parties".

In accordance with these articles and for the reasons that have been set forth, it is appropriate to agree to the suspension of this procedure and the filing of the proceedings.

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 the dismissal of the sanctioning procedure no. 4/2018, relating to the General Directorate of the Police, without prejudice to the considerations made in the recommendation contained in the legal basis 2n.

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

Third.- 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 February 20, by which the Statute of the Catalan Data Protection Agency is approved, who held the status of a person interested in the procedure can file, with discretion, an appeal for reinstatement before the Director of the Authority Catalana de Protección de Dades, within one month from the day after its notification, in accordance with the provisions of article 123 et seq. of Law 39/2015 or you can file a contentious appeal directly administrative 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.

Equally, the person interested in the procedure can file any other appeal that they consider appropriate for the defense of their interests.

The director

M. Àngels Barbarà and Fondevila

Barcelona (on the date of the electronic signature)