File identification

Resolution of sanctioning procedure no. PS 9/2023, referring to the Department of Justice, Rights and Memory

Background

1. On 03/17/2021, the Catalan Data Protection Authority received a letter from a person for which he filed a complaint against the Department of Justice (currently, Department of Justice, Rights and Memory), with reason for an alleged breach of the regulations on the protection of personal data .

Specifically, the person making the complaint pointed out that, through the Catalan penitentiary system, the reported entity applies the RISCANVI protocol, through which, based on a questionnaire, personal data of the incarcerated population is collected and processed for the purposes of increasing the effectiveness of penal measures. In this regard, he complained that special categories of data are collected, that the said treatment is carried out without having obtained the consent of the people affected, and that they are not previously provided with the right to information.

2. The Authority opened a preliminary information phase (no. IP 64/2021), in accordance with the provisions of 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 (henceforth, LPAC), to determine whether the facts were susceptible to motivate the initiation of a sanctioning procedure.

3. In this information phase, on 04/23/2021 the reported entity was required to, among others, provide a copy of the questionnaire model based on the RISCANVI protocol; report on the application criteria and the purpose of the questionnaire; indicate whether the right of information is provided to inmates; and indicated the legal basis that would legitimize the collection and processing of personal data, within the framework of the aforementioned protocol.

4. On 05/05/2021, the Department of Justice responded to the aforementioned request through a letter in which it set out the following:

- That, the collection and processing of the disputed personal data is outside the scope of application of Regulation (EU) 2016/679 of the European Parliament and of the Council, of April 27, relating to the protection of natural persons with regard to the processing of personal data and the free circulation thereof (hereafter, RGPD).
- That, the treatment is within the scope of Directive (EU) 2016/680 which, despite not having been transposed on 05/05/2021, is fully applicable.
- That the RISCANVI assessment questionnaire " *is completed by the professional (lawyer, criminologist, psychologist, social worker and social educator) in the course of their actions with the person deprived of liberty and based on the interactions, interviews and access to documents criminal proceedings. It is an element to order the aspects to be evaluated that corresponds to the Treatment Board, a collegiate body made up of the aforementioned professionals, which deliberates on each case after the collection of information. It constitutes a technical orientation to define the derivative treatment*

program that the intern can accept or not. (...) It is a predictor at the service of the Treatment Board and serves to guide decision-making processes together with other tools, but in no case conditions the decisions of the collegiate body."

- What, the objectives of the RISCANVI protocol focus on increasing the effectiveness of punishments and penal measures, and on favoring the release of inmates to facilitate their rehabilitation and social reintegration. For these purposes, the reported entity argued that all the data that is collected is necessary " *to carry out the technical analysis necessary for the evaluation and treatment and were defined at the time of the creation of the method, since they are part of each of the elements to be analyzed and assessed, respecting what is established in article 4.1 c) of Directive (EU) 2016/680".*

Likewise, the Department also reported that the aforementioned questionnaire is used in relation to the entire prison population, and pointed out that, in compliance with Article 13 of Directive (EU) 2016/680, "reports are made of the extremes collected *in the regulations at the time of entry of the sentenced person into the penitentiary system".*

In relation to the above, the Department pointed out that the legal basis that legitimizes the aforementioned treatment is that provided for in articles 8 and 10 of Directive (EU) 2016/680, in connection with articles 15.2, 59.1, 60.1, 60.2 , 62 of Organic Law 1/1979, of September 26, general penitentiary (hereafter, LGP), as well as articles 20 to 102, 110 et seq. of Royal Decree 190/1996, of February 9, by which approves the Penitentiary Regulation that develops the provisions of the Organic Law.

The reported entity attached the document that is provided to the person who enters a penitentiary, at the time of entry, relating to the processing of their personal data. The mentioned document contains information on the following points: identity of the person responsible for the processing of the data, purpose of the processing, the elaboration of profiles, the legal basis, the recipients of the data, the rights of the interested persons, as well as a link to the Department's website with information on the data protection policy.

5. On 10/06/2021, also during this preliminary information phase, the Authority again addressed a request for information to the reported entity in order to indicate whether, in addition to the information provided to the person incarcerated at the time of his entry into a penitentiary facility, facilitates a new right of information, in relation to the specific processing of personal data, which is carried out in application of the RISCANVI protocol.

6. On 10/19/2021, the Department of Justice responded to the request indicated in the previous antecedent, in the following terms: " *when proceeding to include the person inside the center in the RISCANVI program, no additional information is provided at the beginning, since the data controller considers that this is the beginning of data processing, in line with the wording of the article corresponding to the General Penitentiary Organic Law, which with the modification provided for in the final Disposition first of Organic Law 7/2021, is currently the 15 bis. Even so, the manager will assess the possibility of making a second right of information at this time to improve the quality of the treatment".*

7. On 01/27/2023, the Authority addressed a new request for information to the reported entity, through which it requested a copy of the right to information provided to the incarcerated population at the time of the request. Likewise, it was also required to provide copies of two copies signed by inmates who had entered prison during the period from

September to December 2022.

8. On 02/02/2023, the reported entity responded to the request indicated in the previous antecedent, by means of a letter in which it makes clear that, although they have drawn up a document that includes the right to information, adapted to article 21 of Organic Law 7/2021, of May 26, on the protection of personal data processed for the purposes of prevention, detection, investigation and prosecution of criminal offenses and the execution of criminal sanctions (hereinafter , LO 7/2021), this document " *is not yet used because it is not integrated into the application, pending for the supplier to incorporate it into the SIPC (Catalan Prison Information System)".*

Attached to the Department's letter, there is attached, among other information, a document relating to the right to information provided when a person enters prison, as well as a copy of two copies signed by people who entered to a penitentiary institution during the month of December 2022. These copies, which are sent anonymously, contain the following information:

> *"In accordance with article 5 of Organic Law 15/1999, of December 13, on the protection of personal data, we inform you that the personal data you provide us will be integrated into a file of the Department of Justice of the Generalitat de Catalunya called Prison Population in the Penitentiary Centers of Catalonia, which has as its purpose the comprehensive management of the prison population in Catalonia in relation to the global penitentiary and rehabilitation policy.*
> *In compliance with current regulations, your personal data may be communicated to judicial bodies, the Public Prosecutor's Office, consular representatives (if there is express consent from the intern), the Ministry of the Interior, the forces and security forces and the Ombudsman for Grievances.*
> *The personal data protection regulations establish that your consent is not necessary to process your personal data, since they are collected for the exercise of the Administration's own functions within the scope of its powers.*
> *We inform you that the administrative body in charge of processing the data contained in the aforementioned file is the Secretary of Penal Measures, Reintegration and Victim Support of the Department of Justice (carrer del Foc, no. 57, 08038 Barcelona), and that you can exercise the rights of access, rectification, cancellation and opposition that correspond to you before this penitentiary center".*

9. On 02/22/2023, the director of the Catalan Data Protection Authority agreed to initiate a disciplinary procedure against the Department of Justice, Rights and Memory for an alleged violation provided for in article 60.b), in relation to article 21; all of them from LO 7/2021. This initiation agreement was notified to the imputed entity on 02/23/2023.

10. The initiation agreement explained the reasons why no imputation was made with respect to other facts reported. Specifically, I respect the fact that, within the framework of the application of the RISCANVI protocol, the professionals of the penitentiary institutions involved in it, process special categories of personal data of the incarcerated population, without having previously obtained the consent of the persons affected , it was considered that the LGP protects the mentioned treatment, in accordance with article 13 of LO 7/2021. And it is that, the application of the aforementioned Protocol, involves the treatment of special categories of personal data, which are strictly necessary for the purpose of assessing the effectiveness of criminal measures, and the fulfillment of the sentence . Because of the

above, given that the controversial treatment remains enabled by a standard with the rank of law, the Authority archived these facts.

11. In the initiation agreement, the accused entity was granted a period of 10 working days to formulate allegations and propose the practice of evidence that it considered appropriate to defend its interests.

12. On 07/03/2023, the Department of Justice, Rights and Memory formulated objections to the initiation agreement.

Attached to the statement of objections, the Department provided various documentation, among which stand out the models relating to the right to information, adapted to LO 7/2021, which should have already been implemented and incorporated into the SIPC .

13. On 03/14/2023, the person instructing this procedure formulated a resolution proposal, by which he proposed that the director of the Catalan Data Protection Authority admonish the Department of Justice, Rights and Memory as to responsible, for an infringement provided for in article 60.b) in relation to article 21, both of LO 7/2021.

This resolution proposal was notified on 03/15/2023 and a period of 10 days was granted to formulate allegations **.** The deadline has been exceeded and no objections have been submitted.

proven facts

On 02/03/2023, when LO 7/2021 was already fully in force, the Department of Justice, Rights and Memory, did not report all the ends provided for in article 21 of LO 7/2021, with nature prior to the collection of personal data of people entering a penitentiary. In particular, it did not provide the following information:

- Identification of the data controller and their contact details;
- The contact details of the data protection representative;
- The right to submit a claim to this Authority and its contact details;
- The right to request from the controller the limitation of the processing of personal data;
- Specific purposes for which the data are processed, bearing in mind that, in this regard, only information was provided on the integration of the data in a file whose purpose is the comprehensive management of the incarcerated population of Catalonia.

Fundamentals of law

1. The provisions of the LPAC , and article 15 of Decree 278/1993, according to the provisions of DT 2a of Law 32/2010, of October 1, of 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. The accused entity has not made allegations in the resolution proposal, but it did so in the initiation agreement. Regarding this, it is considered appropriate to reiterate below the most relevant part of the motivated response of the instructing person to these allegations.

The Department of Justice, Rights and Memory acknowledged having facilitated the right of information to people who entered a penitentiary, without adapting it to current regulations on data protection. This period includes at least from 16/06/2021 – date on which LO 7/2021 enters into force – until December 2022, date on which the Department provided the Authority with the copy of the right of information that it provided to people who entered a penitentiary center, and that did not adapt to the regulations in force. Likewise, in the course of this procedure, he also made it clear that, at present, he already makes available to interested persons, the models relating to the right to information, adapted to the content provided for in article 21 of LO 7/2021. And, in this regard, he pointed out that " *they have even carried out this procedure again* [facilitating the right to information] *for those internal people who entered during the last few days".* By way of example, the reported entity provided a copy of the model of the right to information that would have been provided to people who entered the penitentiary centers of Dones Lledoners, Puig de les Basses, Brians 1, Ponent and Mas d' Enric, Obert de Barcelona and Quatre Camins, in the months of February and March 2023.

Along the lines of the above, the Department argued that, " *the use of the previous information right templates, which were not adapted to the current regulations, were being used because they were not integrated into the application and were pending the supplier incorporated it into the SIPC (Catalan Prison Information System) and therefore they were pending integration into the system",* and in this regard, he added that, at present, they have already proceeded to implement and facilitate the right of updated information.

Well, it is worth saying that this Authority positively values the fact that the reported entity has proceeded to update the information it provides to the incarcerated population at the time they enter a penitentiary, regarding the protection of their data, but this update does not distort the facts imputed in this procedure, nor their legal qualification.

Having established the above, in relation to the facts that are imputed here, the Department alleged that, the document that was provided to the incarcerated population - before updating it, in accordance with LO 7/2021 - it did identify the person responsible for the treatment of personal data, their contact details, the activity of the treatment and the right to ask the person responsible for the treatment to access the data, its rectification, deletion or limitation of its treatment.

Well, as can be seen from the 8th precedent of this Resolution, the denounced entity provided copies of two documents, relating to the right to information, signed by two people who entered a penitentiary center during the month of December 2022. And, in relation to these two copies, it is observed that, although it was specified that *"the administrative body in charge of the treatment"* of the data contained in the file "Incarcerated population in the penitentiary centers of Catalonia" is the Secretary of Penal Measures, Reintegration and Attention to the Victim, of the Department of Justice, it was not explicitly and transparently indicated that this body also assumes the status of responsible for the processing of the data collected. And, in this regard, mention should be made of the fact that it was indicated that the exercise of rights had to be carried out in front of the penitentiary center to which they entered, and not in front of the aforementioned Secretariat.

For what is of interest here, it should be noted that the data protection regulations provide for different attributions to the people who assume the roles of " *in charge of the treatment"* or

"responsible for the treatment" of the data. So things are, sections g) ih) of article 5 of LO 7/2021 establish, respectively, that, responsible for the treatment is "the *competent authority that alone or jointly with others, determines the ends and means of the treatment of personal data; in the event that the ends and means of the treatment are determined by the law of the European Union or by the Spanish legislation, said rules may designate the person in charge of the treatment, or the criteria for his appointment" and that is in charge* " the natural *person or legal entity, public authority, service or other body that processes personal data on behalf of the person responsible for the treatment".* In addition, article 23 of LO 7/2021 adds that it is the responsibility of the data controller to attend to the exercise of the rights of the affected person.

In these terms, as pointed out by the instructor of the procedure, the Authority does not share the criterion of the imputed entity according to which, the identity and contact information of the person in charge of data protection was informed, every time that, no it was explicitly informed about who assumed the role of responsible, and only *the "organ in charge of the treatment"* of the data that made up a specific file was informed. This fact could lead to confusion, since it was not clearly informed about the ends provided for in article 21 LO 7/2021.

In line with the above, the reported entity reported that the personal data collected were integrated into a file whose purpose was the comprehensive management of the incarcerated population, in relation to the overall prison and rehabilitation policy. However, this information did not properly refer to the purposes of the processing of personal data, but referred to the purpose of a certain file, which does not allow us to safely exclude that the processing of the data collected could not have other purposes . In this regard, section c) of article 21 of LO 7/2021 explicitly establishes the obligation of the data controller to inform about the purposes of the processing of personal data.

Ultimately, the Department argued that the incarcerated population was informed of the possibility of exercising the right of access, rectification, deletion or limitation of the processing of their personal data. In this regard, the truth is that, although it was informed of the possibility of exercising the right of access, rectification, cancellation and opposition, no allusion was made to the possibility of exercising the right of limitation And, in line with the above, there was also no information on the contact details of the personal data protection delegate, the right to submit a claim before this Authority, nor the contact details to do so.

This lack of information is particularly relevant in the cases of people who are deprived of their freedom in a penitentiary whenever, in accordance with Sentence no. 164/2021 of the Constitutional Court, of October 4, 2021, access to " *essential materials to challenge the legality of detention or deprivation of liberty"* constitutes a fundamental right, as it is an essential instrument for the exercise of the right of defense (art. 24.1 EC). For what is of interest here, the aforementioned sentence included the following argumentation:

> *"(...) the detainee's or prisoner's catalog of rights includes a special informative rigor, well, according to art. 520.2 LECrim, "every person arrested or taken will be informed in writing, in a simple and accessible language, in a language that he understands and immediately, of the facts that are attributed to him and the motivating reasons for his deprivation of liberty, as well as of the rights that assist him". Among those rights is the right to access the elements of the actions that are essential to challenge the legality of the detention or deprivation of liberty [art. 520.2 d) LECrim] that acts as an instrumental guarantee of the*

right to information (SSTC 21/2018, FJ 4, and 83/2019, FJ 5). Both aspects, information and access, work intertwined as guarantees of the right to defense against precautionary deprivations of liberty and serve the ultimate purpose of protecting against arbitrary deprivations of liberty, where the judicial control of the measure is essential [STC 180/2020 , FJ 2 a)].
The right of access to the materials of the actions essential to challenge the legality of the detention or deprivation of liberty that is recognized in the arts. 520.2 d) and 505.3 LECrim is the inseparable complement of the right to information, which serves as an instrumental guarantee. "With a general character, its purpose is to grant the possibility of objectively contrasting the veracity and consistency of the information received in order, in case of disagreement, to question it fundamentally before the judicial authority [...], requesting for it access to that part of the file that records or documents the reasons cited." (STC 83/2019, FJ 5, with reference to STC 21/2018, FJ 7).

In accordance with the above, by way of example, the exercise of the right of access to one's own data may include access to essential materials to challenge certain decisions that affect an individual's freedom. The exercise of this right, however, could hardly be exercised by people incarcerated in a penitentiary, as long as they did not obtain the basic information about the processing of their data, in the terms required by the applicable law.

It is for all the above that it is considered that the Department's allegations cannot distort the classification of the imputed facts, nor exempt it from responsibility.

3. In relation to the facts described in the proven facts section, relating to the breach of the right to information of people who entered a penitentiary, it is necessary to refer to article 21 of LO 7/2021 which provides that " *The person responsible for the treatment of personal data will make available to the interested party, at least, the following information:*

a) The identification of the person responsible for the treatment and their contact details.
b) The contact details of the data protection officer, if applicable.
c) The purposes of the treatment to which the personal data are intended.
d) The right to submit a complaint to the competent data protection authority and its contact details.
e) The right to request from the person responsible for the treatment access to the personal data relating to the interested party and its rectification, suppression or limitation of its treatment.

2. In addition to the information referred to in section 1, taking into account the circumstances of the specific case, the data controller will provide the interested party with the following additional information to enable the exercise of their rights:
a) The legal basis of the treatment.
b) The period during which the personal data will be kept or, when this is not possible, the criteria used to determine that period.
c) The categories of recipients of personal data, when applicable, in particular those established in States that are not members of the European Union or international organizations.
d) Any other necessary information, especially when personal data has been collected without the consent of the interested party."

During the processing of this procedure, the fact described in the proven facts section, which is considered constitutive of the minor infraction provided for in article 60.b) of LO 7/2021,

has been duly proven, in the following form:

> *"b) Failure to comply with the principle of information transparency or the interested party's right to information established in article 21 when all the information required in this Organic Law is not provided."*

4. The exercise of sanctioning power, which corresponds to the Authority, is governed by the specific sanctioning regime that regulates LO 7/2021 and, where it does not contradict it, by Title IX of Organic Law 3/2018 , of December 5, on protection of personal data and guarantee of digital rights (hereinafter, LOPDGDD) and by the regulatory regulations of the Catalan Data Protection Authority.

Article 62.1 of LO 7/2021 provides that, in the case of infractions committed by those responsible listed in article 77.2 LOPDGDD, " *sanctions will be imposed and the measures established in that article will be adopted".* In this sense, article 77.1 provides that the competent data protection authority:

> *"(...) must issue a resolution that sanctions them with a warning. The resolution must also establish the measures to be adopted so that the conduct ceases or the effects of the offense committed are corrected.*
> *The resolution must be notified to the person in charge or in charge of the treatment, to the body to which it depends hierarchically, if applicable, and to those affected who have the status of interested party, if applicable."*

In terms similar to the LOPDGDD, article 21.2 of Law 32/2010 , determines the following:

> *"2. In the case of violations committed in relation to publicly owned files, the director of the Catalan Data Protection Authority must issue a resolution declaring the violation and establishing the measures to be taken to correct its effects . (...)".*

In the present case, given that the Department of Justice, Rights and Memory has accredited to facilitate the duty of information, in accordance with current regulations, the adoption of corrective measures should not be required.

For all this, I resolve:

1. Admonish the Department of Justice, Rights and Memory as responsible for an infringement provided for in article 60.b) in relation to article 21, both of LO 7/2021.

It is not necessary to require corrective measures to correct the effects of the infringement, in accordance with what has been set out in the 4th legal basis.

2. Notify this resolution to the Department of Justice, Rights and Memory.

3. Communicate the resolution to the Ombudsman, in accordance with the provisions of article 77.5 of the LOPDGDD.

4. Order that this resolution be published 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 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, the imputed entity can file, with discretion, an appeal for reinstatement before the director of the Catalan Data Protection Authority Data, within one month from the day after its notification, in accordance with the provisions of article 123 et seq. of the LPAC. You can also directly file an administrative contentious appeal 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, 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 in the terms provided for in article 90.3 of the LPAC.

Likewise, the imputed entity can file any other appeal it deems appropriate to defend its interests.

The director,