Carrer Rosselló, 214, Esc. A, 1r 1a
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RESOLUTION of the rights protection procedure no. 22/2018, urged by Mr. (...) against the General Directorate of the Police of the Department of the Interior of the Generalitat of Catalonia.

Background

1.- On 4/26/2018 it was submitted to the Catalan Data Protection Authority, a letter from Mr. (...), for which he made a claim for the alleged neglect of the right of cancellation, which he had previously exercised before the General Directorate of the Police of the Department of the Interior (hereinafter, DGP).

Specifically, the complainant complained that on 12/2/2018 he had requested the DGP to cancel his personal data recorded in the files of the "Police Information System" area (SIP) of the DGP, relating to the police proceedings that resulted in the processing of the procedure "Preliminary proceedings no. (...) of the Court of Inquiry no. (...), which were inhibited by their joining the Preliminary Proceedings no. (...) of the Court of Inquiry no. (...), where the provisional dismissal was agreed for the crime of reckless homicide and deduction of testimony for the crime against public health, referring it to the Court of Inquiry no. (...) where preliminary proceedings were initiated (...), procedure where an Interlocutory Order was issued agreeing to its provisional dismissal dated 14.07.17", and that the DGP rejected the request through a resolution dated 5 /3/2018.

The claimant provided a copy of the cancellation denial resolution issued by the DGP, together with the notification of the same, as well as the request he had made, and the Court documentation he would have provided with the request, which states that in the proceedings (...) an interlocutory order of provisional dismissal was issued on 1/29/2018, and that this has not been the subject of resource

2.- In accordance with article 117 of Royal Decree 1720/2007, of December 21, which approves the Regulation implementing Organic Law 15/1999, of December 13, on data protection of personal character (hereafter, RLOPD and LOPD, respectively), by means of official notice dated 3/5/2018 the claim was transferred to the DGP, so that within 15 days it could formulate the allegations that I thought relevant.

3.- The DGP made allegations by means of a letter of 29/5/2018, received at the Authority on the same date, in which it stated the following:

- That art. 23.1 of the LOPD provides for the possibility of denying the cancellation of the data depending on the dangers that may arise for public security, the needs of the investigations that are being carried out or the protection of rights and Third party freedoms.

- That art. 22.4 of the LOPD establishes as criteria to be especially taken into account to determine the need to keep data recorded for police purposes: The age of the affected person and the nature of the data stored, the need to

Carrer Rosselló, 214, Esc. A, 1r 1a
08008 Barcelona

keep the data until the conclusion of a specific investigation or procedure, that there is a firm judicial decision related to the facts, especially if this is an acquittal, if a pardon has been issued or the prescription of responsibility or regarding rehabilitation issues.

- That: "In the case object of claim. it was resolved to deny the cancellation of the data considering the following circumstances in particular:
a) That the person concerned was not a minor.
b) That the acting police unit considers that it is necessary to keep the data due to issues of public safety and for the needs of the investigations that motivated it The recording. c)
That the data have not been stored for a period of time excessively long, the police proceedings were instructed on (.May 23, 2017, which implies that there is little room for them to be out of date.
d) That the personal data of the interested party were collected as part of police investigations for facts that could constitute crimes against public safety and homicide due to serious imprudence.
e) That the criminal proceedings that were processed for these facts ended with interlocutors of provisional dismissal and not through resolutions that the conclude definitively. The fact of dictating a dismissal interlocutory provisional does not prevent the process from continuing if new ones appear elements that change this situation before the infringement is prescribed.
f) That in accordance with the provisions of article 131 of Organic Law 10/1995, of November 23, of the Penal Code, the criminal responsibility that could be derived from the facts has not prescribed."

- That: "it is necessary to inform you that, in order to improve the quality and accuracy of the data collected and reduce the damage that the negative decision may cause to the person concerned, an annotation of the criminal proceedings has been made in which the police proceedings have resulted and from which interlocutory orders of provisional dismissal have been issued."

The claimed entity provided together with its allegations, supporting documentation of the date of entry of the request for cancellation of the claimant to the DGP, as well as the proof of notification of the refusal resolution of cancellation issued by the DGP.

4.- This Authority is aware that the DGP is responsible for the file "Information System of the Police of the Generalitat for physical persons (SIP-PF)", cited in the cancellation denial resolution issued by the DGP.

Fundamentals of Law

1.- The Director of the Catalan Data Protection Authority is competent to resolve this procedure, in accordance with articles 5.b) and 8.2.b) of Law 32/2010, of October 1 , of the Catalan Data Protection Authority.

Carrer Rosselló, 214, Esc. A, 1r 1a
08008 Barcelona

2.- This resolution is issued in accordance with the provisions of the LOPD and the RLOPD, as these are the rules applicable at the time when the right of cancellation that is the object of the claim was exercised.

3.- Article 16 of the LOPD, relating to the right of cancellation, determines the following: "1. The person responsible for the treatment has the obligation to make effective the right of rectification or cancellation of the interested party within ten days.
2. The personal data whose treatment does not comply with the provisions of this Law must be rectified or cancelled, where appropriate, and, in particular, when these data are inaccurate or incomplete.
3. The cancellation results in the blocking of the data, and they must only be kept at the disposal of public administrations, judges and courts, for the attention of the possible responsibilities arising from the treatment, during the term of prescription of these responsibilities. Completion of this term, the deletion must proceed.

4. If the rectified or canceled data has been previously communicated, the person in charge of the treatment must notify the person to whom they were communicated of the rectification or cancellation, in the event that the latter maintains the treatment, who must also proceed to cancellation.
5. Personal data must be kept for the periods provided for in the applicable provisions or, where applicable, the contractual relationships between the person or entity responsible for the treatment and the interested party."

The present case refers to the cancellation of data included in a police file, which is why the provisions of art. 22.4 and 23 of the LOPD, which provide the following:

"4. Personal data recorded for police purposes must be deleted when they are no longer necessary for the investigations that have motivated their storage.

For these purposes, the age of the affected person and the nature of the data stored, the need to keep the data until the conclusion of an investigation or a specific procedure, the final judicial decision, especially acquittal, pardon, rehabilitation and limitation of liability.

Article 23. Exceptions to the rights of access, rectification and cancellation.
1. Those responsible for the files that contain the data referred to in sections 2, 3 and 4 of the previous article may refuse access, rectification or cancellation depending on the dangers that may arise for the defense of the State or public security, the protection of the rights and freedoms of third parties or the needs of the investigations that are being carried out.(...)"

For its part, article 31.2 of the RLOPD, provides the following:
"2. Exercising the right of cancellation results in the deletion of data that is inadequate or excessive, without prejudice to the blocking duty in accordance with these Regulations. (...)"

Article 32 of the RLOPD, sections 1 and 2, determines the following:
"1. (...)

In the cancellation request, the interested party must indicate which data they are referring to, and must provide the documentation that justifies it, if applicable.
2. The person in charge of the file must decide on the request for rectification or cancellation within a maximum period of ten days from the receipt of the request. After the deadline has passed without an express response to the request, the interested party can file the claim provided for in article 18 of Organic Law 15/1999, of December 13.

In the event that it does not have the personal data of the affected person, it must also be communicated within the same period."

On the other hand, article 18 of the LOPD, regarding the protection of the rights of access, rectification, opposition and cancellation, establishes the following in its sections 1 and 2:
"1. Actions contrary to the provisions of this Law may be the subject of a claim by the interested parties before the Data Protection Agency, in the manner determined by regulation.

2. The interested party who is denied, in whole or in part, the exercise of the rights of opposition, access, rectification or cancellation, may bring this to the attention of the Data Protection Agency or, where applicable , of the competent body of each autonomous community, which must make sure of the validity or inadmissibility of the refusal."

In line with the above, article 16.1 of Law 32/2010, of the Catalan Data Protection Authority, provides the following:
"1. Interested persons who are denied, in part or in full, the exercise of their rights of access, rectification, cancellation or opposition, or who may understand that their request has been rejected due to the fact that it has not been resolved within the established deadline, they can submit a claim to the Catalan Data Protection Authority."

4.- Having exposed the applicable regulatory framework, it is then necessary to analyze whether the DGP attended to the request for cancellation as provided for in the precepts mentioned in the preceding legal basis. First of all, it is necessary to analyze the formal question regarding whether the DGP responded to the request within the period provided for by the applicable regulations.

In this regard, it is certified in the actions that on 2/14/2018 the request to cancel the police record of the person making the claim was entered in the Registry of the DGP. In accordance with articles 16 LOPD and 32 RLOPD, the DGP had to resolve and notify the request for cancellation within a maximum period of ten days from the date of receipt of the request.

Well, according to the proceedings, the DGP issued a resolution on date 5/3/2018, which was not notified to the person now claiming until 21/3/2018, in accordance with what the DGP has certified during the hearing procedure, so the deadline was exceeded regulations established for the purpose.

Consequently, the estimate of the claim proceeds for formal reasons, since the DGP did not resolve and notify in form and time the said request presented by the

Carrer Rosselló, 214, Esc. A, 1r 1a
08008 Barcelona

affected person This notwithstanding what will be said below regarding the substance of the claim.

5.- From a substantive point of view, it is necessary to determine whether the response given by the DGP to the request of the now claimant - apart from its extemporaneous nature - was in accordance with the precepts transcribed in the 3rd legal foundation.

The right of cancellation regulated in the LOPD is a very personal right, and constitutes one of the essential powers that make up the fundamental right to the protection of personal data. Through the right of cancellation, the person holding the data can request the deletion of data that is inadequate or excessive, without prejudice to the blocking duty, in the terms provided for in the precepts that regulate the right of cancellation.

Thus, in general, the right of cancellation does not come into play solely in the case of inaccurate, incorrect or erroneous data, but could also be exercised with respect to correct data whose treatment does not conform to the provisions of the LOPD (art. 16.2 LOPD), or in the case of personal data that have ceased to be necessary or relevant for the purpose for which they had been collected or registered (art.
4.5 LOPD and correspondingly article 31.2 of the RLOPD, which establishes that "the exercise of the right of cancellation results in the deletion of data that is inadequate or excessive, without prejudice to the duty to block pursuant to this Regulation). Likewise, specifically for the data registered for police purposes, cancellation also occurs when the circumstances provided for in art. 22.4 of the LOPD.

However, the LOPD itself foresees a series of limitations to the cancellation of data, as is the case of those provided for in art. 23.1 of the LOPD in the area of police files, a precept that has already been transcribed in the 2nd legal basis, and also invoked by the DGP, as will be seen, in the antecedents and legal bases of the contested resolution here . Specifically, this precept endorses the denial of requests for the cancellation of personal data made by the affected person, depending on the dangers that may arise for public safety, the protection of the rights and freedoms of third parties, or when the data may be necessary for ongoing police investigations.

In relation to the specific data whose cancellation was requested, in the resolution issued by the DGP on 3/5/2018, the rejection was motivated by the fact that "the personal data continue to be necessary in relation to the investigations that motivated its storage, with the safety and freedom of the victim himself and considers the need to keep the data until the conclusion of the purpose of this given, on the one hand, on the other hand, that the criminal act is still open in the and, process definitively closed, which can be reopened at any time if sufficient evidence appears to demonstrate the commission of a crime or the guilt of the accused, and until the prescription of the facts."

Carrer Rosselló, 214, Esc. A, 1r 1a
08008 Barcelona

So, the DGP came to justify the denial in articles 22.4 and 23.1 of the LOPD previously transcribed, which it expressly cited in another section of the resolution, as well as art. 33 of the RLOPD, and art. 18 of Instruction 12/2010, of September 28, of the DGP. And point 1 of the dispositive part of said resolution had the following content:

"1. Deny the cancellation of the personal data of (...) included in the police proceedings that are related in the first de facto background of this resolution, given that these personal data continue to be necessary in relation to the investigations that motivated the storage, and considers the need to keep the data until the conclusion of the purpose of this, and until the prescription of the facts."

In the allegations made by the DGP in the hearing process of this procedure, it is ratified that the denial of the cancellation was based on the need to maintain the data in the police files, given the concurrent circumstances, made explicit in its resolution, and which it specifies in its allegations, and to that effect it relies on articles 23.1 and 22.4 of the LOPD, the text of which would certainly support, a sensu contrario, the non-cancellation of the data recorded for police purposes, when they are necessary for the investigations that have motivated such recording. However, it must be specified at this point that art. 22.4 refers to the ex officio cancellation of police data, since for the case in which the right of cancellation has been exercised by the affected party, as is the case here, the precept to take into account is the art 23.1 of the LOPD, which provides for the denial in slightly different terms to art. 22.4 of the LOPD. Specifically, the art. 23.1 LOPD allows such refusal "depending on the dangers that may arise for the defense of the State or public security, the protection of the rights and freedoms of third parties or the needs of the investigations that are being carried out" .

Well, the demonstrations carried out by the DGP would certainly fit into the provisions of art. 23.1 LOPD, -invoked also by the DGP-, given that despite having proven the existence of a firm judicial interlocutory in which the provisional suspension of judicial proceedings is decreed, at the discretion of the investigation unit of the PG-ME that intervened in those proceedings, it is necessary to maintain them, and this based on the circumstances of the specific case explained and that the controversial proceedings have been closed with the provisional dismissal of the criminal case, which does not prevent reopen it, as long as and when the eventual responsibilities have not been extinguished, because the corresponding limitation period has passed, in accordance with the provisions of art. 130.1.6 of Organic Law 10/1995, of November 23, of the Penal Code, in which case the cancellation of the disputed police data would proceed. In this regard, according to the documentation provided by the claimant, the facts investigated in the controversial police proceedings would have happened in 2017, which is why, given the nature of the facts investigated (drug trafficking and homicide due to gross negligence) , the applicable statute of limitations would not have expired. In this regard, the DGP affirms "that in accordance with the provisions of Article 131 of Organic Law 10/1995, of November 23, of the Penal Code, the criminal responsibility that could be derived from the facts has not prescribed".

Carrer Rosselló, 214, Esc. A, 1r 1a
08008 Barcelona

That being the case, the pronouncement of this Authority on the substantive issue, that is to say regarding the claim to cancel the data, must necessarily be dismissive. Above all, due to the fact that the judicial pronouncement of dismissal in the process that led to the police actions in respect of which the cancellation is sought is provisional, in such a way that said judicial pronouncement does not therefore prevent the corresponding police investigation from being kept open, as long as the corresponding limitation period has not passed. This, without prejudice to the power that corresponds to this Authority, as guarantor of the right to data protection (art. 1 of Law 32/2010) to verify whether the treatments of this personal data are in accordance with the provisions of the LOPD, and in particular in its articles 22, 23 and 24.

Well, precisely in the exercise of the powers entrusted to this Authority, it is necessary to carry out a final consideration at this point in relation to the present claim - coinciding with that carried out in the resolutions of similar procedures that also affected the DGP (PT 38/2014, PT 54/2014, PT 66/2014, PT 75/2014, PT 10/2015 and PT 59/2015, PT 3/2016, PT 20/2016, PT 39/2016, PT 57/2016, PT 58/2016, and PT 59/2016). And it is appropriate to underline here the obvious damages that could generate in the person here claiming the fact of keeping in the police file the data contained in the police proceedings without more, that is to say, without including the circumstance related to the provisional dismissal decreed by firm interlocutory order.

Faced with this, the DGP should reconcile the right to data protection of the affected person and the needs arising from police investigations. In the procedures for the protection of rights mentioned in the previous paragraph, the DGP was offered two options to satisfy such conciliation, and as the DGP stated in writing before this Authority in those procedures, it assumed the one that was proposed in the line of respecting the needs of police investigations, and in turn guarantee the right to data protection of the affected person, and specifically to comply with the requirements of the principle of data quality, in its aspect of accuracy, when it requires that the data "must be accurate and up-to-date so that they accurately reflect the current situation of the affected person" (art. 4.3 LOPD). In accordance with this, it was pointed out by this Authority in those previous procedures that the DGP should make sure that in any query made in the files of the DGP about the person here claiming, in the section referring to the proceedings disputed here, there was, in a clearly visible way, the annotation relating to the provisional dismissal decreed by means of a firm interlocutory order.

In the present case, the DGP would have already carried out the aforementioned annotation, as stated in the allegations in the hearing procedure, which is why there is no need to make any request in this regard. Specifically, the DGP states that it has incorporated "a record of the criminal proceedings in which the police proceedings have resulted and from which interlocutory orders of provisional dismissal have been issued".

6.- In accordance with what is established in articles 16.3 of Law 32/2010 and 119 of the RLOPD, in cases of estimation of the claim for the protection of rights, the manager of the file must be required so that in the period of 10 days makes the exercise of the right effective. However, in the present case, despite the claim being upheld for formal reasons,

Carrer Rosselló, 214, Esc. A, 1r 1a
08008 Barcelona

it is not appropriate to require the DGP in this regard, given that the claimed entity would have already notified the resolution to the cancellation request, despite having done so extemporaneously. Likewise, as has been advanced, it is also not appropriate to require that the annotation mentioned in the previous legal basis be made, given that the DGP would have already made it.

7.- Finally, given the circumstances of the case presented here, and also in view of the functions entrusted to this Authority to guarantee the right to the protection of personal data, it is necessary to make a final consideration that is already had also carried out in some of the resolutions handed down in the previous guardianship procedures and which have been mentioned in the 4th legal basis, due to the similarity of the circumstances in all cases, which further demonstrates the need to reiterate here the which had already been manifested in said previous procedures.

Both in the present procedure and in the previous ones indicated, the DGP itself would have generated in the claimants an expectation about the provenance of the requested cancellation. And it is that, as was proven in those previous procedures, the DGP had made available to those interested in requesting the cancellation of police records, a form in which several boxes relating to documents to be provided by the sole tenderer to substantiate his claim, among which is the one corresponding to the case in question here: "Attested copy of the interlocutory order of free/provisional dismissal issued in the judicial procedure in which the firmness of this resolution and of the police proceedings from which the judicial procedure derives".

It is worth saying that this provision in the model/form, which would logically lead the affected people to think that the requirements were met in order to estimate the cancellation request, is due to the provision in art. 18 of Instruction 12/2010, issued by the DGP, which was mentioned in the legal basis 6th of the resolution of the DGP that is the subject of this claim, as a motivation for the negative decision adopted, when the certain is that its reading led to interpret the opposite of that decision. Indeed, the said precept sets the requirements for the exercise of the right of cancellation with respect to data recorded in police files of the DGP, and provides to that effect that "Cancellation of the data may be requested when any of the following requirements are met: (...) d) When it has been decreed, through a final judicial interlocutory, the provisional suspension of the judicial proceedings". It is true that in the literal sense of the precept - with the use of the form "Cancellation can be requested" -
it is not expressly determined that in those cases the cancellation proceeds, but again this would be the most reasonable interpretation, as evidenced by the fact that in the same resolution of the DGP it was indicated that in the cases related to said precept "the interested party has the right to obtain cancellation". The fact is that this confusion could be avoided if in art. 18 of the Instruction is expressly warned that such cancellation would be subject to the non-concurrence of any of the cases provided for in art. 19 of the same Instruction, in which a series of cases of denial are collected.

On the basis of this consideration, it is necessary to recommend once again to the DGP that it revises the aforementioned model/form for data cancellation request

police, in order to avoid false expectations in the people interested in requesting such cancellation, as it happened to the person here claiming, in accordance with what he shows in his letter of claim.

For all that has been exposed,

RESOLVED

First.- Estimate in part, for formal reasons, the guardianship claim made by Mr. (...), against the General Directorate of the Police of the Department of the Interior, for not having responded to the request for data cancellation within the period established by the applicable regulations; and dismiss the said claim in substance, given that the requested cancellation does not proceed, for the reasons explained in the 5th and 6th grounds of law.

Second.- Notify this resolution to the General Directorate of the Police of the Department of the Interior and to the person making the claim.

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 20 February, by which the Statute of the Catalan Data Protection Agency is approved, the interested parties can file, as an option, an appeal for reinstatement before the director of the Catalan Data Protection Authority, in the period of one month from the day after its notification, in accordance with the provisions of article 123 et seq. of Law 39/2015 or directly file an administrative contentious appeal before the administrative contentious courts of Barcelona , 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 administrative contentious jurisdiction.

Likewise, the interested parties may file any other appeal they deem appropriate for the defense of their interests.

The director,

M. Àngels Barbarà and Fondevila

Barcelona, (on the date of the electronic signature)