apdcat
Autoritat Catalana de Protecció de Dades

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RESOLUTION of the rights protection procedure no. PT 37/2018, urged by Mr. (...)against the General Directorate of the Police.

Background

1.- On 7/19/2018 it was submitted to the Catalan Data Protection Authority, a letter from a person, who stated acting on behalf of Mr. (...), for which a claim was made for the alleged disregard of the right of cancellation, which he had previously exercised before the General Directorate of Police (hereinafter, DGP) of the Department of the Interior of the Generalitat of Catalonia. Specifically, the person making the claim requested that their personal data be deleted from the Police Information System of the Generalitat de Catalunya for natural persons (SIP PF).

The claimant provided various documentation relating to the exercise of this right:

1) Copy of the request dated 5/24/2018, registered on the same date with the Territorial Services in Tarragona of the Department of Territory and Sustainability, through which the claimant exercised the right of cancellation before the DGP

2) Copy of the resolution dated 22/6/2018 of the DGP regarding the right of cancellation exercised by the claimant here on 24/5/2018 as well as the official letter dated 27/6/2018 by of which the DGP notified said resolution.

2.- By official letter dated 7/31/2017, notified on the same day to the claimant, this Authority required the claimant to amend his request, in the sense of accrediting the representation who had made the claim.

The person making the claim responded to said request on 3/8/2018 and, to that effect, provided the supporting documentation of the representation.

3.- 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 nature (hereafter, RLOPD and LOPD, respectively), by means of an official letter dated 8/28/2018, the claim was transferred to the DGP, so that within 15 days it could formulate the allegations that I thought relevant.

4.- The DGP made allegations by means of a letter dated 10/17/2018, in which it set out, in summary, the following:

- That: "Article 23.1 of Organic Law 15/1999, of December 13, on the protection of personal data (LOPD), establishes specific cases in which the cancellation of recorded personal data may be refused in certain files of the bodies and security forces. Among the cases collected, it is foreseen the possibility of denying the cancellation of the data depending on the dangers that may arise for public security, the protection of rights and

the freedoms of third parties or the needs of investigations that are being carried out."

ÿ That: "Article 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 keep the data until the conclusion of an investigation or a specific procedure, that there is a firm judicial resolution related to the facts, especially if this is acquittal, if a pardon has occurred or the prescription of the responsibility or attending to rehabilitation issues."

- That: "In the case subject to the complaint, it was decided to deny the cancellation of the data weighing the right of cancellation of the interested person against the following circumstances:

a. That the person concerned was not a minor. b. That the acting police unit considers that it is necessary to keep the data for issues of public safety and for the needs of the investigations that motivated the recording. c. That the data has not been stored for an excessively long period of time, police investigations were instructed on April 2, 2017, which implies that there is little room for it to be out of date. d. That the personal data of the person concerned was collected as part of a police action in which legal assets of a relevant nature would have been affected (physical and/or psychological violence in the home). e. That the criminal procedure that was processed for these facts ended with an interlocutory order of provisional dismissal and not by means of a resolution that concluded it definitively. The fact that an interlocutory order of provisional dismissal is issued does not prevent the process from continuing if new elements appear that change this situation before the infringement expires. 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."

ÿ That: "In relation to this issue, we should also 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 interested person, we have proceeded to carry out an annotation of the criminal procedure in which the police proceedings have resulted and of which a provisional dismissal order has been issued."

- That: "Finally, and as you requested, I am sending you a copy of the documentation Next:

a) Copy of the first page of the cancellation request submitted by the interested party, which states that it was registered on 05/24/2018.

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b) Copy of the notice of receipt of the resolution of the cancellation request, which states that the resolution was notified on 07/10/2018."

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.

2.- At the time when this resolution is issued, the personal data that were the subject of processing by the DGP and to which the request for deletion referred, the Directive (EU) would apply 2016/680, of the European Parliament and of the Council, of 27/4, relating to the protection of natural persons with regard to the processing of personal data by the competent authority for the purposes of prevention, investigation, detection or prosecution of infringements criminal or enforcement of criminal sanctions, and the free circulation of this data (Directive (EU) 2016/680), in accordance with what is established in its article 1. In this regard, it should be emphasized that the Directive (EU) 2016/680, has not been transposed into national internal law within the period provided for that purpose (05/06/2018), but transitional provision 4a of Organic Law 3/2018, of December 5 , of protection of personal data and guarantee of digital rights (LOPDGDD), also in force at the time of issuing the in this resolution, provides that data processing that is subject to Directive (EU) 2016/680 will continue to be governed by the LOPD, and in particular by article 22, and its development provisions, until enter into force the rule that transposes into Spanish law the provisions of the aforementioned directive, in accordance with what has been provided for in the LOPDGDD.

Therefore, in accordance with what has been stated, this resolution is issued in accordance with the provisions of the LOPD and RLOPD, as these are the applicable rules at this time but also at the time when the right of cancellation (24/5/2018) which is the subject of a claim here.

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 data controller must notify the rectification or cancellation made to

whom they have communicated, in the event that the latter maintains the treatment, which must also proceed with the 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."

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 explained the applicable regulatory framework, it is then necessary to analyze whether the DGP has resolved and notified, within the period provided for by the applicable regulations, the right of cancellation exercised by the person making the claim.

In this regard, it is certified that on 5/24/2018, a letter from the person claiming here was entered in the Register of the Territorial Services of Territory and Sustainability of Tarragona, through which he exercised his right to cancel the your personal data from the SIP PF file. 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. For the purposes of knowing the date on which the request had been received at the DGP, as part of the processing of the present claim, and specifically at the office of transfer to the DGP of the claim, it was required to report on the date on which he received the request to exercise the right, information that the DGP has not specified.

In relation to the question of the term, it should be borne in mind that in accordance with article 21.3 b) of Law 39/2015, of October 1, on the common administrative procedure of public administrations (hereinafter, LPAC) and article 41.7 of Law 26/2010, of August 3, on the legal regime and procedure of the public administrations of Catalonia (hereafter, LRJPCat), on the one hand, the calculation of the maximum term in initiated procedures at the request of a party - as is the case - it starts from the date on which the request was entered in the register of the competent body for its processing. And on the other hand, that the maximum term is for resolving and notifying (article 21 of the LPAC), so that before the end of this term the resolution must have been notified, or at least have occurred the duly accredited notification attempt (art. 40.4 LPAC).

Well, it is stated in the actions that the DGP resolved on 6/22/2018 the request submitted on 5/24/2018, and the first notification attempt - which would be the date to take into account to assess whether had respected the maximum period of 10 days to resolve and notify - this was done on 6/7/2018, with the resolution finally being notified on 10/7/2018. Consequently, the estimate of the claim proceeds, since the DGP
did not resolve and notify the affected person in the form and time frame of said request. This notwithstanding what will be said below regarding the substance of the claim.

5.- Once the above has been established, it is appropriate to analyze the substance of the claim, that is to say, if the answer given by the DGP to the request of the now claimant, conformed to the precepts transcribed in the basis of law 3rd

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.

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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 states 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 in accordance with 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 6/22/2018, the rejection was motivated by the fact that "these personal data continue to be necessary in relation to the police proceedings that led to their storage, given that the legal proceedings initiated as a result of them are in the process of execution and have not yet ended". At this point, it is appropriate to point out that in the hearing procedure granted, the DGP has qualified that although "the criminal procedure that was processed for these facts ended with a provisional dismissal interlocutory and not by means of a resolution that concluded definitely. The fact that an interlocutory order of provisional dismissal is issued does not prevent the process from continuing if new elements appear that change this situation before the infringement expires." In fact, from the content of the interlocutory provided by the claimant here, it can be inferred that the reason for the provisional file lies in the fact that in the investigative procedures carried out, the person claiming here could not be located. (...)

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 precedent of this resolution, given that the judicial proceedings initiated as a result of the same have not yet finished."

In the allegations made by the DGP in the hearing procedure 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, which he specifies in his allegations, and to this end he relies on articles 23.1 and 22.4 of the LOPD, the literal wording 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 statements made by the DGP in the hearing procedure conferred for the purpose, would certainly fit in with 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 person making the claim, the police proceedings would have been initiated in 2017, which is why, and given the nature of the facts investigated (physical and/or psychological violence in the field of the home), the applicable statute of limitations does not appear to 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".

That being the case, the pronouncement of this Authority on the substantive issue, that is to say, regarding the claim to cancel the data, it must necessarily be rejected. 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 it
Authority, proceed to make a final consideration at this point in relation to

the present claim - coinciding with the one made 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, among others). 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. In particular, the DGP states that it has incorporated "an annotation of the criminal procedure in which the police proceedings have resulted and from which a provisional dismissal order has 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 case at hand, in which the estimate obeys formal reasons for not having notified the resolution of the request within the maximum period provided for the purpose, it is not necessary to make any request, given that accredited that the DGP already notified the resolution, even if it was extemporaneously.

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 recall again the recommendation made to the DGP in order to review the model/form mentioned above for the cancellation of police data, in order to avoid false expectations in the persons concerned in requesting such cancellation, as it occurred to the person here claiming, in accordance with what he states in his letter of claim.

For all that has been exposed,

RESOLVED

First.- To consider for formal reasons the guardianship claim made by Mr. (...)against the General Directorate of the Police of the Department of the Interior of the Generalitat of Catalonia, and dismiss it as regards the merits of the matter, without proceeding to make any request in accordance with what has been exposed in the 6th law foundation.

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Second.- Recommend the General Directorate of the Police to revise the model/form of "request for cancellation of personal data recorded in the files of the SIP area", in accordance with what has been set out in foundation of law 7th.

Third.- Notify this resolution to the General Directorate of the Police and to the person making the claim.

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 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)