

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

RESOLUTION of the rights protection procedure no. PT 54/2018 urged by Mr (...) against the General Directorate of Police.

Background

1.- On 02/11/2018 it was registered with the Catalan Data Protection Authority, a letter from Mr(...), in which he formulated a claim for the alleged neglect of the right of cancellation, which he had previously exercised before the General Directorate of Police (hereinafter, the DGP). Specifically, the claimant requested that his personal data be deleted from the SIP PF file, relating to police proceedings no. (...), processed by the USC of Cambrils of the Police of the Generalitat - Mossos d'Esquadra (henceforth, MMEE), which derived in the Court of Misdemeanors (...) and with the Executive (...), of the Court of Inquiry no. (...).

The claimant specifically complained about the DGP's lack of response to his request for cancellation, which he had made in writing dated 09/18/2018, and of which he provided a copy.

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 nature (hereafter, RLOPD and LOPD, respectively), by means of official document dated 09/11/2018 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 dated 11/15/2018, in which it stated, in summary, the following:

- That "On 09/18/2018, the aforementioned person (Mr(...)) registered a request for personal data addressed to this General Directorate"
- That "On 10/23/2018, the General Directorate of the Police resolved the request submitted and agreed to cancel the personal data of the person concerned".
- That "On 10/30/2018, the notification of the resolution referred to in the previous point was registered as outgoing and on 11/09/2018 this was notified to the interested person".

And finally, that "with regard to the proof of receipt of the notification of the resolution, we still do not have this document. However, I would like to inform you that the notification was registered to mails with reference (...) and according to the website of this company, it was delivered on 09/11/2018".

The claimed entity provided together with its allegations, a copy of the cancellation request that the person claiming here had made before the DGP; copy of the resolution of the director general of the Police, dated 23/10/2018, by which the request for cancellation made by the person making the claim is estimated; and copy of the notification of said resolution of the cancellation of personal data.

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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, to the personal data that were the subject of processing by the DGP and to which the deletion request referred, Directive (EU) 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 criminal offenses or execution 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 respect, it should be emphasized that the Directive (EU) 2016/680, has not been transposed into national internal law within the deadline for that purpose (05/06/2018), and consequently the so-called vertical effect of the European directives occurs, which allows individuals can directly invoke European law before the courts, independently entities that have been transposed or not into national law. Thus, in accordance with the doctrine of the Court of Justice of the European Union, individuals may invoke the direct effect

of the precepts of the directive when they confer rights in an unconditional and sufficiently clear and precise way before the public administrations.

On the other hand, it is worth saying that in this case the application of Regulation (EU) 2016/679 of the European Parliament and of the Council, of 27/4, relating to the protection of natural persons with regard to the processing of data personal data and the free movement of these (RGPD), applicable since 05/25/2018, is very limited, given that its article 2.2.d), excludes from the scope of application of the RGPD the treatment of personal data "by the competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences, or the execution of criminal sanctions, including protection against threats to public security and their prevention". However

this, it should be borne in mind that article 10 of the RGPD regulates the processing of personal data relating to convictions and criminal offenses indicating that "it may only be carried out under the supervision of public authorities or when authorized by law of the Union or of the Member States that establishes adequate guarantees for the rights and freedoms of those concerned. Only a complete record of criminal convictions can be kept under the control of the public authorities".

Article 23.1 of the same RGPD also refers to this issue:

"The law of the Union or of the Member States that applies to the person in charge or the person in charge of the treatment may limit, through legislative measures, the scope of the obligations and the rights established in articles 12 to 22 and article 34, as well as in article 5 to the extent that its provisions correspond to fundamental rights and freedoms and is a necessary and proportionate measure in a democratic society to safeguard: a) the security of the State; b) the defense; c) public safety; d) the prevention, investigation, detection or prosecution of violations

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criminal or the enforcement of criminal sanctions, including protection against threats to public safety and prevention; (...)"

Having said that, it is necessary to indicate that the cancellation or deletion request was submitted when Organic Law 15/1999, of December 13, on the protection of personal data (LOPD) was still in force, which has recently repealed by Organic Law 3/2018, of December 5, on the Protection of Personal Data and guarantee of digital rights (LOPDGDD). In any case, since the data cancellation request that gave rise to this claim was submitted before the date on which the LOPDGDD would apply, this resolution is issued in accordance with the provisions of LOPD and RLOPD, as these are the rules applicable at the time when the right of cancellation that is the subject of the claim was exercised. In addition to all this, it should be noted that although the LOPD has currently been repealed by the LOPDGDD, with regard to data processing that is subject to Directive (EU) 2016/680, these will continue to be governed by the LOPD, and in particular by article 22, and its development provisions, until the rule that transposes into Spanish law the provisions of the aforementioned directive enters into force, in accordance with what has been foreseen in the transitional provision 4a of the LOPDGDD.

2.- 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."

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:

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"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."

Given that the right subject to this resolution refers to a treatment carried out by the security forces, it is necessary to refer to the specific regulation for these cases provided for in articles 22.4 and 23.1 of the LOPD, which determine the following:

"Article 22. Files of the Security Forces and Bodies.

(...) 4. The personal data recorded for police purposes must be canceled when they are not 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 deny 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 being carried out. (...)"

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

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understand that their request has been rejected due to the fact that it has not been resolved within the established period, they can submit a claim to the Catalan Data Protection Authority."

3.- 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, since precisely the reason for the complaint of the person who initiated the present procedure for the protection of rights was the fact of not having obtained a response within the period provided for the purpose.

In this regard, it is certified that on 18/09/2018 a letter was entered in the Registry of the DGP by the person here claiming, through which he exercised his right to cancel his personal data that appeared in the SIP file PF, in relation to police proceedings linked to criminal offences.

In this sense, article 16.2 of Directive (EU) 2016/680, provides that "Member States will require the person in charge of the treatment to delete the personal data without undue delay and will have the right of the interested party to obtain from the person in charge of the treatment the deletion of the personal data that concern him without undue delay when the treatment infringes articles 4, 8 or 10, or when the personal data must be deleted by virtue of a legal obligation to which the person in charge of the treatment is subject".

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.

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, the DGP has not proven to have responded to the request within the ten-day period provided for that purpose, since the DGP itself states that it did not do so until 09/11/2018, when it notified now claiming the resolution by which his request for the cancellation of personal data was considered, a copy of which has been provided in the hearing procedure, and which was signed electronically on 23/ 10/2018. It is worth saying that even in the case that the one-month period provided for by the RGPD for the resolution of deletion requests had been taken as a reference, the deadline would also have been exceeded time limit.

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Consequently, the assessment of the claim proceeds from this formal perspective, given that the DGP did not resolve and notify the said request presented to the affected person in a timely manner. Regarding the merits of the claim, given that the DGP has issued the resolution by which the request for cancellation submitted by the person making the claim is considered, it becomes irrelevant to make further considerations in this regard.

3.- 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, even if the resolution is considered for formal reasons, it is not appropriate to require the DGP in this regard, given that it would have already notified the resolution of the cancellation request, despite having -I did it extemporaneously. On the other hand, as announced in the previous legal basis, it is not appropriate to require the DGP in terms of the fund, because it would have already canceled the personal data of the claimant here, in accordance with the provisions to the resolution dated 10/23/2018 of the director general of the Police provided in the hearing procedure.

For all that has been exposed,

RESOLVED

First.- Estimate the guardianship claim made by Mr. (...) against the Management General of Police of the Department of the Interior of the Generalitat of Catalonia.

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

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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)

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