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RESOLUTION of the rights protection procedure no. PT 61/2018, relating to the General Directorate of the Police

Background

1.- On 18/12/2018 it was reported to the Catalan Data Protection Authority, a letter presented by the representative of Mr. (...), in which he formulated a claim for the alleged neglect of the right of cancellation previously before the General Directorate of the Police (hereinafter, DGP).

2.- On 20/12/2018, this Catalan Authority required the interested party to amend the initial claim letter within ten days, since it was not possible to prove that the right of cancellation had been exercised before the person responsible for the file or processing, and that the person who had submitted the claim was acting on behalf of the affected person.

3.- On 16/01/2019 and 08/03/2019, the claimant submitted the required documentation. On the one hand, he provided a copy of his data cancellation request before the DGP, with a date of entry in the register of 10/19/2018, in which he had requested that it be deleted from the System d'informació from the Generalitat police of physical persons (SIP), their personal data related to police proceedings no. (...), both initiated by the Court of Violence against Women (...). And on the other hand, he provided a copy of the resolution of the DGP dated 31/10/2018 by which the request was denied.

4.- In accordance with article 117 of Royal Decree 1720/2007, of December 21, which approves the Regulation for the implementation of Organic Law 15/1999, of December 13, on data protection of personal character (hereafter, RLOPD and LOPD, respectively), by means of an official letter dated 03/22/2019, 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 04/24/2019, in which it set out, in summary, the following:

- That article 23 of the LOPD "provides the possibility of denying the cancellation of data based on the dangers that may arise for public security, the protection of the rights and freedoms of third parties or the needs of research that is being carried out";
- 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 person affected 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 an acquittal, if a pardon has occurred or the prescription of responsibility or regarding questions of rehabilitation";

- That "in the case subject to the claim, 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 due to public safety issues and the need for the investigations that motivated the recording.
 - c) That the data has not been stored for an excessively long period of time, the police investigations (...) were conducted on August 29, 2017 and the (...) were conducted on August 6 of 2018, 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 actions for an event in which legal assets of a relevant nature were affected. In this regard, it should be mentioned that the police investigations (...) were investigated for the commission of alleged crimes of domestic abuse, sexual assault and habitual physical/psychological violence in the 'familial sphere and that the proceedings (...) were initiated for an alleged crime of abuse in the sphere of the home.
 - e) That the criminal proceedings that were initiated for these events ended with interlocutory hearings of provisional dismissal and not through resolutions that concluded them definitively. The fact that provisional dismissal orders were issued does not prevent the proceedings from continuing if new elements appear that change this situation before the alleged infringements expire.
 - f) That in accordance with what is established in 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 "in order to improve the quality and accuracy of the data collected and to reduce the damage that the negative resolution may cause to the person concerned, an annotation has been made of the criminal procedures in which the police and what have been issued interlocutory orders of provisional dismissal".

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.- Directive (EU) 2016/680, of the European Parliament and of the Council, would apply to the personal data that was the subject of processing by the DGP and to which the request for deletion referred, 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 the execution of criminal sanctions, and free movement

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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 Directive (EU) 2016/680 has not been transposed into law internal state within the deadline set for the purpose (on 6/05/2018), and consequently individuals can directly invoke European law before the courts, regardless of whether or not they have been transposed 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 directive's precepts when they confer rights unconditionally and in a sufficiently clear and precise manner before public administrations.

It should be noted that although the LOPD has currently been repealed by the LOPDGDD, 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 the rule that transposes into Spanish law the provisions of the aforementioned directive enters into force, in accordance with what has been provided for in transitional provision 4a of the LOPDGDD. Likewise, in accordance with Additional Provision 14a of the LOPDGDD, articles 23 and 24 of the LOPD also remain in force as long as they are not expressly modified, replaced or repealed.

3.- Article 16 of the LOPD, relating to the right of cancellation, determined 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, in 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."

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, established in its sections 1 and 2 the following:

"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 deadline

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established, they can file a claim with the Catalan Data Protection Authority.”

4.- Once the above has been established, it is appropriate to analyze the merits of the claim, that is to say, whether the answer given by the DGP to the request of the now claimant, conformed to the precepts transcribed in the legal basis previous

The right of cancellation 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 what was available 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 field of police files, a precept that has already been transcribed in the 3rd legal basis, and also invoked by the DGP, as will be seen, in the antecedents and legal bases of the resolution contested 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 10/31/2018, 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 the need to keep the data until the conclusion of its purpose is considered, given on the one hand, the proximity in time , the characteristic and repetition of the criminal acts, and their seriousness and, on the other hand, that a provisional dismissal does not leave the 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 those prosecuted, and until the statute of limitations.”

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 its 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, -also invoked by the DGP-, given that despite the existence of a firm judicial interlocutory order in which the provisional suspension of the judicial proceedings is decreed, it is necessary to maintain them, and this on the basis to the circumstances of the specific case explained and "that the criminal proceedings that were initiated for these events ended with interlocutory hearings of provisional dismissal and not through resolutions that concluded definitively. The fact that they issued interlocutory orders of provisional dismissal does not prevent the proceedings from continuing if new elements appear that change this situation before the alleged infringements expire", 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 investigations would have occurred in 2017 and 2018, which is why the applicable statute of limitations would not have expired. On this, the DGP affirms "that in accordance with the provisions of Article 131 of Organic Law 10/1995, of 23 November, 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, must necessarily be

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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.

In the present case, along the lines established in previous resolutions issued by this Authority, the DGP would have already carried out a notation relating to the provisional dismissal decreed through a firm interlocutory order, as certified in the allegations in the hearing procedure, reason why it is not necessary to make any request in this regard. In particular, the DGP states that it has incorporated "a record of the criminal proceedings in which the police proceedings have resulted and of which a provisional dismissal order has been issued".

For all that has been exposed,

RESOLVED

First.- Dismiss the guardianship claim made by Mr. (...) against the General Directorate of the Police.

Second.- 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,

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