apdcat
Autoritat Catalana de Protecció de Dades

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RESOLUTION of the rights protection procedure no. PT 1/2019, urged by Mr. (...)against the General Directorate of the Police.

Background

1.- On 02/01/2019 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, DGP). Specifically, the person making the claim requested that their personal data related to police proceedings no. (...), be deleted from the Generalitat Police Information System file for physical persons (SIP). instituted by the Court of Violence against Women No. 1 of Hospitalet de Llobregat.

The claimant provided various documentation relating to the exercise of this right, specifically, the following:
- copy of your data cancellation request before the DGP with entry date 09/19/2018;

- documentation from the Court of Violence against Women number 1 of Hospitalet de Llobregat, referring to the urgent proceedings procedure no.(...)/2018-C, which states that in the aforementioned proceedings an interlocutory order was issued provisional dismissal on date (...), and that this became firm;
- copy of the resolution dated 05/11/2018 of the DGP by which the requested data cancellation request was rejected.

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 notice dated 10/01/2019 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 01/23/2019, 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 a specific investigation or procedure, that there is a firm judicial resolution related to

the facts, especially if this is an acquittal, if there has been a pardon or the prescription of responsibility or regarding issues 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, police proceedings were instructed on June 29, 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 in the framework of police action for events in which legal assets of a relevant nature were affected. In this sense, it should be mentioned that police investigations were conducted for abuse 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 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 "it is necessary to inform you that, in order to improve the quality and accuracy of the data collected and to reduce the damages that the negative decision may cause to the person concerned, an annotation of the criminal procedure has been made in what have resulted from the police investigations and from what has been issued an interlocutory order of provisional dismissal".

The claimed entity provided together with its allegations, the resolution of refusal to cancel data of 5/11/2018 issued by the DGP, a copy of the notification of the resolution, as well as the proof of the personal notification of the resolution dated 11/16/2018.

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.

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2. Directive (EU) 2016/680, of the European Parliament and of the Council, would apply to the personal data that were the subject of processing by the DGP and to which the request for deletion referred 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 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 Directive (EU) 2016/680 has not been transposed to internal state law within the deadline set for the purpose (on 05/06/2018), and consequently the so-called vertical effect of the European directives takes place, which allows individuals to directly invoke European law before the courts , regardless of whether or not they have been transposed into national law nal
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.

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 of 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, 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 the public authorities or when authorized the 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 criminal offenses or the execution of criminal sanctions, including protection against threats to public security 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. 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, referring to 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 established deadline, they can submit a claim to the Catalan Data Protection Authority."

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4.- Having explained the applicable regulatory framework, it is then necessary to analyze whether the DGP goes resolve and notify, within the period provided for by the applicable regulations, the right of cancellation exercised by the person claiming, since precisely the reason for the complaint of the person who initiated the present rights protection procedure was the fact of not having obtained a response within the period provided for the purpose.

In this regard, it is certified that on 09/19/2018 a letter was entered in the Registry of the DGP by the person here claiming, through which he exercised his right to cancel the personal data recorded in the files of the SIP scope.

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, according to the proceedings, the DGP issued a resolution on 5/11/2018, when it was not notified to the person here claiming until 16/11/2018, in accordance with what has been certified by the DGP during the hearing procedure, so that the statutory deadline for the purpose was exceeded.

Consequently, the assessment of the claim proceeds from a formal point of view, since the DGP did not resolve and notify the said request submitted by the affected person in a timely manner. 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 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.

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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 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 5/11/2018, 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, given, on the one hand, the characteristic of the criminal act, its pluriofensivity and, on the other hand, the existence of criminal 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 prescription of the facts."

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

maintenance of the data in the police files, given the concurrent circumstances, made explicit in its resolution, and which it specifies in its allegations, and it relies for this purpose on articles 23.1 and 22.4 of the LOPD, the literal which would certainly guarantee, 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 controversial proceedings have been closed with the provisional dismissal of the criminal case and not by means of a resolution that definitively concludes it, which does not prevent it from being reopened if new elements appear that make changes this situation before the infringement prescribes", 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 facts investigated in the controversial police proceedings would have happened in 2018, which is why, given the nature of the facts investigated (abuse in the home) , 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".

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.

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. Specifically, the DGP states that it has incorporated "an annotation

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of the criminal procedure in which the police proceedings have resulted and of 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 term of 10 days make effective the exercise of right However, in the present case, even if the claim is considered for formal reasons, 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, all and having done it 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 previous resolutions issued by the Authority in similar procedures, which further demonstrates the need to reiterate here what had already been stated 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 revise the aforementioned model/form of request for the cancellation of police data, in order to avoid false expectations in the persons interested 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.- 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 data cancellation request 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 legal basis, and without it being necessary to require the claimed entity in accordance with the 6th legal basis.

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