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Autoritat Catalana de Protecció de Dades

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RESOLUTION of the rights protection procedure no. PT 6/2019, urged by Mr. (...)(...)against the General Directorate of the Police.

Background

1.- On 18/02/2019 it was reported to the Catalan Data Protection Authority, a letter from Mr. (...), for which he made a claim for the alleged neglect of the right of cancellation, which he had previously exercised before the General Directorate of Police (hereinafter, DGP). Specifically, the claimant requested that deleted from the Generalitat Police Information System file for physical persons (SIP), their personal data related to police proceedings no. (...) and no. (...), which resulted in legal proceedings processed by Courts of Instruction 26 and 27 of Barcelona, respectively.

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 of 09/14/2018;

- copy of the request for amendment or improvement of the application issued on 05/11/2018 by the DGP, in which they requested him in relation to police proceedings no. (...), the judicial certification attesting to the definitive filing of the actions;
- copy of the response to the amendment request with entry date of 11/23/2018;
- copy of the resolution dated 11/01/2019 of the DGP through which it is decided to cancel the personal data relating to police proceedings no. (...), and deny the cancellation of personal data relating to police proceedings no. (...).

2.- In accordance with article 117 of Royal Decree 1720/2007, of December 21, which approves the Regulation implementing Organic Law 15/1999, of December 13, on data protection of personal character (hereafter, RLOPD and LOPD, respectively), by means of an official letter dated 03/08/2019, 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 in a letter dated 04/01/2019, in which it set out, in summary, the following:

ÿ That "the processing of data subject to the guardianship procedure is included in the scope of application of Directive (EU) 2016/680 of the European Parliament and Council, of April 27, 2016, regarding the protection of natural persons with regard to the processing of personal data by the competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offenses or enforcement of criminal sanctions, and the free circulation of the aforementioned data";

ÿ That "in accordance with the fourth transitional provision of Organic Law 3/2018, of December 5, on the protection of personal data and the guarantee of digital rights, the treatments subject to Directive (EU) 2016/680 of the European Parliament and Council, of April 27, 2016, continue to be governed by Organic Law 15/1999, of December 13, until the rule that transposes into Spanish law the provisions of the aforementioned directive enters into force";

- 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, police investigations were instructed on February 12, 2018, which implies that there is little room for it 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 the police proceedings were instructed by reception.
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 interested person, an annotation of the procedure has been made

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criminal case in which the police proceedings have resulted and from which a provisional dismissal order has been issued".

The claimed entity provided a copy of the resolution together with its allegations issued by the DGP, dated 11/01/2019, by which it is decided to estimate the cancellation of data relating to police proceedings no. (...) and deny the cancellation of data relating to police proceedings no.(...), copy of the official notification of the resolution, as well as the proof of the personal notification of the date resolution 28/01/2019.

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 treatment by the DGP and to which the request for cancellation, 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 authority would apply competent 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 the provisions of its article 1, which provides in its article 16 the right of deletion, which replaces the previous right of cancellation. In this regard, it should be noted that Directive (EU) 2016/680 has not been transposed into national law within the deadline set for that purpose (05/06/2018), 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.

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 been 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 this regard, it should be indicated that when article 16.2 of Directive (EU) 2016/680 foresees that the Member States will demand from the data controller the deletion of personal data "without undue delay" and the right of the interested parties to obtain the responsible for processing the deletion of personal data, compliance with this

requirement must be understood as fulfilled in the terms established in article 16.1 of the LOPD, on the right of rectification and cancellation, which establishes that the data controller has the obligation to exercise the right to rectification or cancellation of the interested party within ten days.

In addition to all this, it should be noted that although the LOPD has 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 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, 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 by the applicable regulations, the right of cancellation exercised by the person making the claim.

In this regard, it is certified that on 09/14/2018 a letter was entered in the Registry of the DGP by the person here claiming, through which he exercised his right of cancellation with respect to 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 01/11/2019, which was not notified to the person making the claim until
28/01/2019, in accordance with what the DGP has certified during the hearing procedure, so that the deadline established by regulation for the purpose was exceeded by far. In this regard, it should be noted that in this case, and in accordance with article 22.1.a) of the LPAC, the deadline for resolution could have been suspended due to the request of the DGP to the interested party in order to contribute documents linked to your data cancellation request, based on article 68 of the LPAC. However, it should be noted that the indicated amendment request had already been formulated by the DGP once the maximum deadline for the resolution and notification of the request had been exceeded. What's more, even discounting the period in which it had been suspended due to said amendment request, the resolution issued by the DGP would also have been clearly extemporaneous.

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

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First of all, as indicated in the antecedents of this resolution, it should be emphasized that the resolution of the contested DGP, on the one hand, estimates the cancellation of personal data relating to police proceedings no. . (...), and on the other hand, rejects the cancellation of the personal data relating to police proceedings no. (...). In this regard, given that the claim presented by the claimant here focuses on the request to cancel the data that the DGP has not considered (police proceedings no. (...), this basis will be entered only to the analysis of the aforementioned refusal to cancel data.

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 01/11/2019, the rejection of the cancellation of the data relating to police proceedings no. . (...) in which "the personal data continue to be necessary in relation to the investigations that motivated their storage, and considers the need to keep the data until the conclusion of its purpose, given, d on the one hand, the characteristic of the criminal act, its proximity in time 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 prescription of the facts."

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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, given that despite having proven the existence of a firm judicial interlocutory in which the provisional suspension of judicial proceedings is decreed, it is necessary to maintain them, and this based on the circumstances of the specific case explained and "that the criminal procedure that was processed for these facts ended with an interlocutory order of provisional dismissal and not by means of a definitively concluded resolution. 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 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 respect, 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 (crime of receipt), it would not have been exceeded the applicable limitation period. 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".

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So things are, the pronouncement of this Authority on the substantive issue, that is to say regarding the claim to cancel the personal data relating to police proceedings no. (...), 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 the Law

32/2010) to verify whether the processing of this personal data complies with the provisions of the LOPD, and in particular 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 "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 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.

For all that has been exposed,

RESOLVED

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

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Third.-.- Order the publication of the Resolution on the Authority's website (www.apd.cat), in accordance with article 17 of Law 32/2010, of October 1.

Against this resolution, which puts an end to the administrative process in accordance with articles 26.2 of Law 32/2010, of October 1, of the Catalan Data Protection Authority and 14.3 of Decree 48/2003, of 20 February, by which the Statute of the Catalan Data Protection Agency is approved, the interested parties can file, as an option, an appeal for reinstatement before the director of the Catalan Data Protection Authority, in the period of one month from the day after its notification, in accordance with the provisions of article 123 et seq. of Law 39/2015 or directly file an administrative contentious appeal before the administrative contentious courts of Barcelona , within two months from the day after its notification, in accordance with articles 8, 14 and 46 of Law 29/1998, of July 13, regulating administrative contentious jurisdiction.

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

The director,