apdcat
Autoritat Catalana de Protecció de Dades

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RESOLUTION of the rights protection procedure no. PT 22/2019, urged by Mr. (...) against the General Directorate of the Police.

Background

1.- On 16/05/2019 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 the Police (hereinafter, DGP). Specifically, the person making the claim requested that their personal data be deleted from the Generalitat Police Information System file for natural persons (SIP) related to police proceedings no.(...)/2018, which they resulted in a judicial process processed by the Court of Inquiry 2 of Vilanova i la Geltrú.

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

- Copy of your request for cancellation of police records before the DGP with entry date of 02/26/2019
- Copy of the personal data cancellation resolution dated 03/27/2019, by which it is decided to deny the cancellation of personal data relating to police proceedings no.(...)/2018, together with with the copy of the notification of said resolution with date of departure 04/12/2019.
- Copy of the interlocutory order of the Magistrate's Court 2 Vilanova i la Geltrú, dated 09/10/2018, whereby the provisional suspension and filing of the proceedings (relating to police proceedings no. (...)/2018) for "the perpetration of the crime that has given rise to the present case not being duly justified".

- Copy of the certificate from the Court of Inquiry no. 2 of Vilanova i la Geltrú by means of which it certifies that the interlocutory order dated 09/10/2018 became final, agreeing to the provisional adjournment and filing of the proceedings.

(...)

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 05/27/2019, 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 06/17/2019, 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 infringements

criminal or execution 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 23.1 of the LOPD "provides for the possibility of denying the cancellation of data depending on the dangers that may arise for public safety, the protection of the rights and freedoms of third parties or the needs of investigations that are 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 proceedings were instructed on April 23, 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 regard, it should be mentioned that the police investigations were conducted due to alleged sexual abuse, the complainant being a minor.

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 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.

f) That in accordance with the provisions of Article 131 of Organic Law 10/1995, of November 23, of the Penal Code, the criminal responsibility that could be derived from the facts has not prescribed";

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- That "it is necessary to inform you that, in order to improve the quality and accuracy of the data collected and reduce the damages that the negative resolution 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, a copy of the resolution issued by the DGP, dated 03/27/2019, by which it was decided to 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 resolution, practiced on 04/16/2019.

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. 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 the execution of criminal sanctions, and the free movement of such data (Directive (EU) 2016/680), in accordance with what is established in 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.

The request for cancellation - or deletion - of data analyzed here was submitted before the DGP when Organic Law 3/2018, of December 5, on the Protection of Personal Data and Guarantee of Digital Rights (LOPDGDD), which repealed Organic Law 15/1999, of December 13, was already fully applicable protection of personal data (LOPD). However, with regard to data processing that is subject to Directive (EU) 2016/680, it should be noted that transitional provision 4a of the LOPDGDD provides that 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 what the aforementioned Directive provides comes into force. 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 the treatment

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 person responsible for treatment has the obligation to exercise the interested party's right of rectification or cancellation within ten days.

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:

"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:

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"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 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."

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.

In this regard, it is certified that on 02/26/2019 a letter was entered in the DGP Registry 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.

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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 03/27/2019, which was not notified to the person here claiming until 04/16/2019, 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 this formal perspective, given that the DGP did not resolve and notify the said request presented to the affected person in a timely manner. This notwithstanding what will be said below regarding the substance of the claim.

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 2nd

The right of cancellation - or deletion - 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 this right, the person holding the data can request the deletion of data that is inadequate or excessive, without prejudice to the duty to block, in the terms provided for in the precepts that regulate the right of cancellation.

Thus, in general, the right of cancellation or deletion 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 provided by 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 coincidentally article 31.2 of the RLOPD, which states that "the exercise of the right of cancellation results in the deletion of data that is inadequate or excessive, without prejudice to the duty to block in accordance with this Regulation). Likewise, specifically for the data

registered for police purposes, cancellation also occurs when the circumstances provided for in art. 22.4 of the LOPD.

However, the LOPD itself foresees a series of limitations to the cancellation of data, as is the case of those provided for in art. 23.1 of the LOPD in the field of police files, a precept that has already been transcribed in the legal basis 2on, and invoked also 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 03/27/2019, 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 the purpose of this, given, d on the one hand, the proximity in time, the characteristics 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 to prove 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 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 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, 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 regard, according to the documentation provided by the claimant, the facts investigated in the controversial police proceedings would have happened in 2018, which is why, given the nature of the facts investigated (alleged sexual abuse of a minor), the applicable limitation period 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 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 prevent the corresponding police investigation from being kept open, always and when 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 "an annotation of the criminal procedure in which the police proceedings have resulted and from which a provisional dismissal order has been issued".

5.- 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, despite the claim being upheld for formal reasons,

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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, despite having done so 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.

6.- 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 (or equivalent judicial certificate)".

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 to review the aforementioned model/form for data cancellation request

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police, in order to avoid false expectations to the people interested in requesting such cancellation, as it happened to the person here claiming, in accordance with what he shows in his letter of claim.

For all that has been exposed,

RESOLVED

First.- Estimate in part the guardianship claim made by Mr. the term established by the applicable regulations; and dismiss the said claim in substance, since the requested cancellation does not proceed, for the reasons explained in the 4th legal basis, and without it being necessary to require the claimed entity in accordance with what has been indicated to the foundation of law 5th.

Second.- Notify this resolution to the General Directorate of the Police of the Department of the Interior and to the person making the claim.

Third.- Recommend to the DGP to review the model/form of request for cancellation of police data, in accordance with what has been set out in the 6th legal basis.

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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