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RESOLUTION of the rights protection procedure no. PT 50/2019, urged by Mr. (...), against the General Directorate of the Police

Background

1.- On 7/10/2019 the Catalan Data Protection Authority received a letter from Mr. (...), through which he formulated a claim against an alleged neglect of his right of cancellation.

Specifically, the claimant complained about the meaning of the resolution issued, on 05/01/(...) by the Directorate General of Police (hereinafter, DGP), through which the cancellation was refused. lation of your personal data from the Generalitat Police Information System file (SIP PF), relating to police proceedings number (...), which resulted in the previous proceedings (...), of the Court of Instruction (...) of Girona.

The claimant provided a copy of the resolution of the DGP dated 05/01/(...) and a copy of the judicial certification stating that in the aforementioned preliminary proceedings, an interlocutory order of provisional dismissal was issued and that this became firm.

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 an official letter dated 06/26/2019, 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 08/11/2019, in which it set out, in summary, the following:

- That *"On November 16 of (...) the person concerned submitted the request to cancel police proceedings no. (...) instructed for robbery with force, in which she was arrested. In his letter he indicated the personal data that he explicitly requested to be deleted and as supporting documentation he provided a court certificate dated November 13 of (...) that certified the dictation of the interlocutory order of provisional dismissal."*
- That *"On January 5 of (...) the Resolution was issued refusing to cancel the requested personal data, justifying the reasons: investigations that motivated their storage, characteristic of the criminal act and proximity in time. This resolution was notified to the person concerned on January 17 of (...)."*
- That *"In the letter now presented by the representative of the interested person (...) provides a testimony of the interlocutory with the same date of issue of November 13 of (...). In order to be able to make a new assessment, taking into account that the previous request is from November of (...), it is necessary to submit a new request for cancellation, providing supporting judicial documentation with the current date of issue to find out if the*

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*procedure is in the same situation or if subsequent actions have been taken in this regard."*

The claimed entity provided together with its allegations, a copy of the notice of receipt of the resolution of the DGP dated 01/05/2020, in which it is stated that the postal notification of said resolution was proceeded on 17/01/(...).

#### 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.- First of all, it is necessary to start from the premise that from the letter of the claimant here it is inferred that the object of the present protection claim is the resolution of the DGP, dated 05/01/(. ..). Through said resolution, the cancellation of the claimant's personal data from the SIP PF file managed by the DGP was denied, motivated by the fact that *"these personal data continue to be necessary in relation to the investigations that motivate its storage, and considers the need to keep the data until the conclusion of the purpose thereof, and until the prescription of the facts"*.

Having said that, it is necessary to indicate that both the request for cancellation or deletion and the resolution of the DGP of 05/01/(...) by which the cancellation of personal data was refused by the claimant, was presented and resolved when Organic Law 15/1999, of December 13, on the protection of personal data (LOPD) was still in force. As things stand, this resolution is issued in accordance with the provisions of the LOPD and Royal Decree 1720/2007, of December 21, which approves the Development Regulations of the LOPD (RLOPD), being therefore the applicable rules at the time when the right of cancellation had been exercised and which was resolved with the corresponding resolution of the DGP, subject of the present claim.

Be that as it may, it should also be noted that although as of today, the LOPD has been repealed by the LOPDGDD, with regard to data processing that is subject to Directive (EU) 2016/680, these 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 is provided for in transitional provision 4a of the LOPDGDD. Finally, it should be indicated that when article 16.2 of Directive (EU) 2016/680 foresees that the Member States will demand from the controller the deletion of personal data *"without undue delay"* and the right of the interested parties to obtain from the controller 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 responsible for the treatment has the obligation to make effective the right of rectification or cancellation of the interested party within ten days.

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3.- 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:

*"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.*

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*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."*

4.- Having explained the applicable regulatory framework, it is appropriate to analyze the substance of the claim, that is, whether the resolution of the DGP conformed to the precepts transcribed in the previous legal basis, since precisely the reason for the complaint of the person who initiated the present rights protection procedure was the fact that his personal data recorded in the SIP PF file of the DGP, were not cancelled. This is why this basis will only analyze 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 data

correct, the treatment of which does not comply with the provisions of 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 blocking duty according 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, also invoked by the DGP. 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 05/01/(...) 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 characteristic of the criminal act, its proximity in time and, on the other, 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."*

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 procedure 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, justifying the reasons : *"investigations that motivated its storage, characteristic of the criminal act and proximity in time."* 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"* .

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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 , specifically that *"they continue to be necessary in relation to the investigations that motivated their storage, with the safety and freedom of the victim himself, and considers the need to keep the data until the conclusion of the purpose of this service, on the one hand, the characteristic of the criminal act, its proximity in time and, on the other, that a provisional suspension 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"*, 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, as well as the statements of the DGP during the hearing procedure, the facts investigated in the police proceedings would have happened in the year (...) and the judicial certificate provided by the person claiming it was dated 13/11/(...) reason why, given the nature of the facts investigated (theft with force), at the time the resolution of the DGP was issued, on 05/01/(...) the applicable limitation period would not have passed.

So things are, the pronouncement of this Authority on the substantive issue, that is to say regarding the resolution of the DGP by which the cancellation of 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 was sought, at the time when the resolution of the DGP was issued, was provisional, in such a way that the said judicial pronouncement did not prevent the corresponding police investigation from being kept open, as long as the corresponding statute of limitations had 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.

On the other hand, it should be noted that, from the content of the claimant's letter, it is inferred that the claim also raises not only the complaint about the meaning of the resolution of the DGP dated 05/01/(...) but also that the cancellation of your personal data from the SIP PF file of the DGP at the current time. In this sense, he argues that *"more than 2 years have passed since the events happened for which our representative was arrested, who was subsequently released and decreed the provisional dismissal of the events being investigated"*. In this regard, it should be indicated that in the event that it is considered that the eventual responsibilities have already expired and that the cancellation of the personal data of the now claimant is to be reconsidered, the new request must be submitted before the entity responsible for the processing of personal data

that are requested to be cancelled, in this case the DGP, which is competent to reassess, based on the circumstances, the facts and the documentation provided, if the cancellation of the requested personal data proceeds . Regarding this, it is worth noting that the DGP in the document presented

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during the hearing procedure, in the same vein, he advanced that *"In order to make a new assessment, taking into account that the previous request is from November of (...) it is necessary to submit a new request for cancellation by providing judicial supporting documentation with a current issue date to find out if the procedure is in the same situation or if subsequent actions have been taken in this regard"*. This without prejudice, that in the event that the interested party submits a new request and is denied, in part or in full, the exercise of the right of cancellation or may understand that the request has been rejected due to the fact that it has not been resolved within the established period, may present a new claim before this Authority, as provided for in article 16.1 of Law 32/2010, of the Catalan Data Protection Authority.

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 DGP and the person making the claim.

Fourth.- Order the publication of the Resolution on the Authority's website ([www.apd.cat](http://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,