

Carrer Rosselló, 214, Esc. A, 1r 1a
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File identification

Resolution of the rights protection procedure no. PT 34/2021, petition against the Department of Justice.

Background

1. On 03/17/2021, the Catalan Data Protection Authority received a letter from Mr. (...) (hereinafter, the person making the claim), for which he made a claim for the alleged neglect of the right of access to his personal data, which he had previously exercised before the penitentiary center of Mas d'Enric of the Department of justice

Specifically, the claim referred to the request for access to the reports of the multidisciplinary technical team of the penitentiary, in relation to the denial of two exit permits that he had previously requested. According to the documentation provided by the claimant, specifically:

a) Request for an ordinary exit permit dated 06/10/2020.

On 08/25/2020 the Treatment Board denied the requested permission and notified the decision to the person claiming on 09/08/2020.

On 09/09/2020, 09/10/2020 and 09/17/2020, the claimant requested a copy of the technical report of the multidisciplinary technical team.

On 09/21/2020, the Treatment Board of the aforementioned penitentiary responded to the previous request by means of a letter, notified to the person claiming on 09/24/2020, by which he was informed that he did not have the reports tendered. In the same response it was specified that the reason for which the permit had been denied was contained in the written agreement of the Treatment Board dated 08/25/2020, and added the reason for which it was denied the permit, specifically, to be pending to start the itineraries of drug addictions and those of gender violence.

b) Request for an ordinary exit permit dated 08/10/2020.

On 09/29/2020 the Treatment Board denied the permission requested by the person claiming and notified him of the decision on 10/06/2020.

On 07/10/2020 the person making the claim requested a copy of the technical report drawn up by the multidisciplinary team.

There is no response to this request.

2. On 03/30/2021, the claim was transferred to the Data Protection Delegate of the Department of Justice so that within 15 days he could formulate the allegations he considered relevant.

3. The Data Protection Delegate of the Department of Justice made allegations in a letter dated 04/19/2021, in which he stated the following:

- That, when the Treatment Board of a penal execution center for adults resolves a request for a second-level exit permit, it does not ask for prior reports; dictates the resolution in which the reason for the refusal is indicated and notifies the applicant.
- That both the request and the resolution and its notification to the intern are contained in the interested party's own claim document, both in the permit requested in June and in August.
 - That, technical reports are only carried out in case of appeal and specific request from the Penitentiary Surveillance Court. Therefore, it is not possible to give access to information that does not exist and thus was revealed to the claimant before he went to the supervision of the control authority.
 - Regarding the request for the exit permit dated 06/10/2020, it stated that: on 09/09/2020, 09/10/2020 and 09/17/2020, the intern went alone request access to the technical reports, and that a written response was issued dated 09/21/2020 (notified on 09/24/2020), in the sense that since it is an agreement denying permission, no the reports of the Multidisciplinary Team were available, but that, nevertheless, the reasons for the refusal of permission were contained in the certificate of the Board's agreement of August 25, 2020.
 - With regard to the request for the exit permit dated 10/08//2020, it stated that:
on 7/10/2020 the intern requested access to the technical reports. And he added: *"It is not recorded that the previous instance was answered. However, on the aforementioned date, the technical reports requested by the intern were not available and therefore it was not possible to access them, given that, the usual practice of the center is that in the case of denial of permits, no prepare technical reports, unless required by the Penitentiary Surveillance Judge. In any case, the reasons for the refusal of permission are known to the intern, given that they are contained in the permission denial agreement, notified to the intern on October 6"*.

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. Article 15 of Regulation (EU) 2016/679 of the European Parliament and of the Council, of April 27, relating to the protection of natural persons with regard to the processing of personal data and the free movement of such data (hereafter, the RGPD), regarding the right of access of the interested person, provides that:

"1. The interested party will have the right to obtain confirmation from the person in charge of the treatment as to whether or not personal data is being processed

concern and, in such case, right of access to personal data and the following information:

- a) the purposes of the treatment;*
- b) the categories of personal data in question;*
- c) the recipients or the categories of recipients to whom the personal data was communicated or will be communicated, in particular recipients in third parties or international organizations;*
- d) if possible, the expected period of personal data conservation or, if not possible, the criteria used to determine this period;*

- e) the existence of the right to request from the person in charge the rectification or suppression of personal data or the limitation of the treatment of personal data relating to the interested party, or to oppose said treatment;*
- f) the right to present a claim before a control authority;*
- g) when the personal data has not been obtained from the interested party, any available information about its origin;*
- h) the existence of automated decisions, including profiling, referred to in article 22, sections 1 and 4, and, at least in such cases, significant information about the logic applied, as well as the importance and expected consequences of said treatment for the interested party.*

2. When personal data is transferred to a third country or an international organization, the interested party will have the right to be informed of the appropriate guarantees under article 46 relating to the transfer.

3. The person responsible for the treatment will provide a copy of the personal data subject to treatment. The person in charge may charge a reasonable fee based on administrative costs for any other copy requested by the interested party. When the interested party presents the request by electronic means, and unless he requests that it be provided in another way, the information will be provided in a commonly used electronic format.

4. The right to obtain a copy mentioned in section 3 will not negatively affect the rights and freedoms of others."

In relation to the rights contemplated in articles 15 to 22 of the RGPD, paragraphs 3 to 5 of article 12 of the RGPD, establishes the following:

"3. The person in charge of the treatment will provide the interested party with information related to their actions on the basis of a request in accordance with articles 15 to 22, and, in any case, within one month from the receipt of the request. This period can be extended another two months if necessary, taking into account the complexity and the number of requests. The person in charge will inform the interested party of any such extension within one month of receipt of the request, indicating the reasons for the delay. When the interested party presents the

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request by electronic means, the information will be provided by electronic means when possible, unless the interested party requests that it be provided in another way.

4. If the person in charge of the treatment does not comply with the request of the interested party, he will inform him without delay, and no later than one month after receiving the request, of the reasons for his non-action and of the possibility of submitting a claim before a control authority and exercise judicial actions.

5. The information provided under articles 13 and 14 as well as all communication and any action carried out under articles 15 to 22 and 34 will be free of charge. When the requests are manifestly unfounded or excessive, especially due to their repetitive nature, the person in charge may:

a) charge a reasonable fee based on the administrative costs incurred to facilitate the information or communication or perform the requested action, or

b) refuse to act in respect of the request.

The person responsible for the treatment will bear the burden of demonstrating the manifestly unfounded or excessive nature of the request.

(...)"

For its part, article 13 of Organic Law 3/2018, of December 5, on the protection of personal data and guarantee of digital rights (hereinafter, LOPDGDD), determines the following, also in relation to the right to access:

"1. The affected person's right of access must be exercised in accordance with the provisions of Article 15 of Regulation (EU) 2016/679.

When the person in charge processes a large amount of data relating to the affected person and he exercises his right of access without specifying whether it refers to all or part of the data, the person in charge may request, before providing the information, that the affected person specifies the data or the processing activities to which the request refers.

2. The right of access is understood to be granted if the data controller provides the affected person with a remote, direct and secure access system to personal data that guarantees, permanently, access to all of it. For this purpose, the communication of the person in charge to the person affected by the way in which he can access the aforementioned system is sufficient to consider the request to exercise the right.

However, the interested party can request from the person in charge the information referred to the ends provided for in article 15.1 of Regulation (EU) 2016/679 that is not included in the remote access system.

3. For the purposes established in article 12.5 of Regulation (EU) 2016/679, the exercise of the right of access more than once during the period of six months can be considered repetitive, unless there is a legitimate reason for do it

4. When the person affected chooses a means other than the one offered to him that involves a disproportionate cost, the request must be considered excessive, for which

so the aforementioned affected party must assume the excess costs that their choice entails. In this case, the person in charge of the treatment is only required to satisfy the right of access without undue delay."

In relation to the above, article 16.1 of Law 32/2010, of the Catalan Data Protection Authority, regarding the protection of the rights provided for by the regulations on personal data protection, 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."

Apart from the previous regulation, in the case analyzed here, it is also necessary to take into account the regulations relating to the penitentiary regime that are applicable. Specifically, Organic Law 1/1979, of September 26, general penitentiary (hereinafter, Penitentiary Law), in its article 47.2 establishes that:

"2. Likewise, departure permits of up to seven days can be granted as preparation for life in freedom, with the prior report of the technical team, up to a total of thirty-six or forty-eight days per year to convicts of second or third degree, respectively, as long as they have extinguished the fourth part of the sentence and do not observe misconduct"

Likewise, Royal Decree 190/1996, of February 9, which approves the Penitentiary Regulations (hereinafter, the Penitentiary Regulations), with respect to ordinary permits, establishes that:

Article 154

1. With the mandatory prior report of the technical team, ordinary exit permits of up to seven days can be granted as preparation for life in freedom, up to a total of thirty-six or forty-eight days per year to convicts classified in the second or third degree respectively, as long as they have extinguished the fourth part of the sentence or sentences and do not have bad behavior.

Article 156

1. The mandatory report of the technical team must be unfavorable when, due to the peculiar criminal trajectory, the anomalous personality of the inmate or due to the existence of unfavorable qualitative variables, the breaking of the sentence is likely, the commission of new crimes or a negative repercussion of the release on the inmate from the perspective of his preparation for life in freedom or his individualized treatment program.

2. The technical team must establish, in its report, the conditions and controls that must be observed, if applicable, during the enjoyment of the exit permit, compliance with which must be assessed for the granting of new permits.

And about the procedure for granting exit permits:

Article 160

Initiation and instruction

1. The technical team must make a report on the request for ordinary or extraordinary exit permits made by the intern, and must also verify that the objective requirements required to enjoy the permit are met, must assess the peculiar circumstances determining its purpose and must establish, when appropriate, the conditions and controls referred to in article 156.

2. In view of the mandatory report mentioned, the treatment board must agree to grant or deny the permission requested by the intern.

Article 161

concession

1. If the treatment board agrees to grant the permission requested by the intern, it must raise the aforementioned agreement, together with the report of the technical team, to the supervising judge or the management center, according to these are inmates classified in the second or third degree of treatment, respectively, for the corresponding authorization.

Article 162

Denial

When the treatment board agrees to deny the permission requested by the inmate, he must be notified of the reasoned decision with express indication of his right to complain to the prison surveillance judge.

And still, on the functions of the Treatment Board, Decree 329/2006, of September 5, which approves the Regulations for the organization and operation of the services of criminal enforcement in Catalonia, provides in its article 32, that:

1. The Treatment Board, without prejudice to the competences of the management center and the multidisciplinary teams, must perform the following functions:

h) Grant prison exit permits, with the prior report of the multidisciplinary team, requesting the authorization of the prison surveillance judge or the management center, as appropriate.

3. Having set out the applicable regulatory framework, it is then necessary to analyze whether the Department of Justice gave effect to the claimant's right of access in the terms requested.

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From the information provided by the person making the claim, it appears that on 09/09/2020 and 07/10/2020, he exercised the right of access to the technical reports of the multidisciplinary team of the penitentiary where he was incarcerated. And that these reports were related to two exit permits that I had applied for on 10/06/2020 and 10/08/2020, respectively.

In accordance with the provisions of article 47.2 of the Penitentiary Law in relation to article 154 of the Penitentiary Regulations, the technical reports of the multidisciplinary team are mandatory and prior to the granting of ordinary permits. And article 160 of the Penitentiary Regulations states that: "*1. The technical team must make a report on the request for ordinary or extraordinary exit permits made by the intern (...)*" and *2. In view of the mandatory report mentioned, the treatment board must agree on the granting or denial of the permit requested by the intern.* According to the precepts transcribed, the reports requested by the person claiming should be part of the files administrative instructed as a result of their requests for ordinary exit permits from dates 06/10/2020 and 08/10/2020. And in accordance with article 15.3 of the RGPD, the controller should provide a copy of the personal data subject to processing, more specifically, a copy of the reports. This, without prejudice to what will be said later.

Given the above, the following questions are raised:

- a) if the said penitentiary center responded to the requests made by the person making the claim;
- b) if the penitentiary satisfied the right of access in relation to the request for the said reports.

a) Regarding the first question, from the documentation provided by the person claiming it has been proven that the Penitentiary Center's Treatment Board responded to the first request (09/09/2020) within the legally established deadline for that purpose (written notification on 09/24/2020). The response letter indicated the following: "*the reports of the Multidisciplinary Team are not available, but that, nevertheless, the reasons for the denial of the permit are contained in the certificate of the Board's agreement of August 25 2020*". Regarding the request for a report dated 07/10/2020 referring to the request for permission to leave the date 08/10/2020, no response has been verified. In fact, in the allegations formulated by the Department of Justice, it states that there is no response to this request.

b) With regard to the specific reason for complaint that the person making the claim raised, that is to say, that the requested technical reports were not provided to him. According to the allegations made by the Department of Justice, they could not give access to information that did not exist, since the technical reports were not made.

Regarding this, aside from the legal consequences that, in other areas of the Law, could arise from the fact of not having drawn up the mandatory technical reports, it is necessary to warn

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that the Authority is not competent to pronounce on this matter. Therefore, this resolution will deal exclusively with the right of access to the data of the person making the claim. Consequently, the facts will only be assessed from the point of view of the Right to Personal Data Protection.

Given the above, it is necessary to determine whether the Department of Justice satisfied the claimant's right of access in the legally established terms.

As a starting point, it should be borne in mind that article 15 of the RGPD defines the right of access as the right of the affected person to obtain information about their own personal data that is the subject of treatment and, in such case, access said data and information on the purposes of the treatment, the categories of personal data, the recipients to whom the personal data have been communicated or will be communicated, as well as the rest of the information detailed in article 15.1 of the RGPD. In addition, article 15.3 of the RGPD expressly recognizes the right of any person to obtain from the data controller a copy of the document containing the personal data for which access has been requested.

The right of access is a very personal right, and constitutes one of the essential powers that make up the fundamental right to the protection of personal data. As has already been advanced, through the right of access the owner of the data can find out which data about his person are the subject of treatment. In addition, this right could be the basis for the exercise of other rights, such as those of rectification, deletion, limitation, portability or opposition.

This is why the limitations to this right of access must be minimal given that through its exercise the effectiveness of the fundamental right to the protection of personal data is guaranteed. The reasons for denying the right of access can be found in article 23 of the RGPD, which must be foreseen "through legislative measures" (art. 23.1 RGPD).

Regarding the access request dated 09/09/2020, the penitentiary responded to the person claiming that it did not have the requested reports. On the other hand, in the letter of allegations from the Department of Justice, it stated that the Treatment Board of the penitentiary center in question does not ask for the prior reports of the technical team, that only technical reports are carried out in case of appeal and specific request from the Penitentiary Surveillance Court. And, therefore, that you cannot give access to information that does not exist. And that this was revealed to the claimant.

Well, in accordance with article 15.1 of the RGPD, the person making the claim has the right to obtain confirmation from the data controller as to whether or not their personal data is being processed. And, if the requested reports exist, you would have the right to obtain a copy (Article 15.3 of the RGPD). However, if, as the Department of Justice claims, the referred reports do not exist, it could not provide this data, because this data processing would not have been carried out. However, in order to comply with the claimant's right of access, the data controller should inform him that he does not have this information. Well, from the information provided by the person claiming,

it is known that the treatment board of the penitentiary center responded to your request dated 09/09/2020 by which they informed you that they did not have the requested report. This response was notified to you on 24/09/2020, therefore, within the legally prescribed period.

Regarding the second report request dated 07/10/2020, the Department of Justice has not certified that the request has been answered. In fact, the Department itself states that there is no record of a response to the second request. However, he alleges that the requested technical reports were not available and therefore it was not possible to access them, and that the reasons for the refusal of the permit were known to the person making the claim. In this regard, it must be said that, regardless of whether the reasons for the refusal are known to the person making the claim, he or she has the right to access the reports, if they exist, and, in the event that the reports are not available, he or she has the right to obtain confirmation that these reports are not available. It is worth remembering that in accordance with prison regulations, these prior reports are mandatory, which is why the claimant is requesting a copy.

In short, the present claim for protection of the right of access should be partially considered, given that in the present procedure it has been proven that Mr. (...) exercised the right of access with respect to two requests for the reports of the multidisciplinary technical team before the Mas d'Enric Penitentiary Center of the Department of Justice, and it is also proven that only one of the access requests was answered. And the right of access exercised with respect to the request dated 07/10/2020 was not effective, taking into account that part of the right of access is the right to obtain confirmation as to whether the data of the affected are being treated or not.

4. 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 protection of rights, the person in charge of the file must be required so that within the term of 10 days to make the exercise of the right effective.

In accordance with this, it is necessary to require the claimed entity so that, within 10 counting days from the day after the notification of this resolution, it makes effective the exercise of the claimant's right of access in the terms set out in the legal basis 3rd b) regarding the access request made by the person claiming on 7/10/2020. Once the right of access has been made effective in the terms set out and the person making the claim has been notified, in the following 10 days the claimed entity must report to the Authority.

For all this, I resolve:

1. Estimate the guardianship claim made by Mr. (...) against the Department of Justice, but only with respect to the access request made on 7/10/2020.
2. Request the Department of Justice to respond to the exercise of the right of access exercised by the person making the claim within 10 days from the day after the notification of this resolution, in the form indicated in the 3rd legal basis

b) Once the right of access has taken effect, in the following 10 days the claimed entity must report to the Authority.

3. Notify this resolution to the Department of Justice and the person making the claim.

4. Order the publication of the resolution on the Authority's website (apdcat.gencat.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 February 20, which approves the Statute of the Catalan Agency of Data Protection, the interested parties can file, as an option, an appeal for reinstatement before the director of the Catalan Data Protection Authority, within one month from the day after its notification, or in accordance with the provisions of article 123 et seq. of the LPAC or to directly file an administrative contentious appeal before the administrative contentious courts of Barcelona, within two months from the day after its notification, or in accordance with articles 8, 14 and 46 of Law 29/1998, of July 13, regulating administrative contentious jurisdiction.

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

The director,