Deliberation 2020-065 of June 25, 2020Commission Nationale de l'Informatique et des LibertésNature of the deliberation: OpinionLegal status: In force Date of publication on Légifrance: Friday December 18, 2020NOR: CNIX2033751VDeliberation n° 2020-065 of June 25, 2020 providing an opinion on a draft decree amending the provisions of the internal security code relating to the processing of personal data called "Information management and prevention of attacks on public security" (request for opinion no. 19013314)The National Commission for the computing and freedoms,

Seizure by the Minister of the Interior of a request for an opinion concerning a draft decree modifying the provisions of internal security relating to the processing of personal data called Information management and Prevention of attacks on public security;

Having regard to Convention No. 108 of the Council of Europe for the protection of individuals with regard to automatic processing of personal data;

Having regard to Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention and detection of criminal offences, investigation and prosecution thereof or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA;

Having regard to the internal security code, in particular its articles R. 236-21 et seq.;

Considering the law n° 78-17 of January 6, 1978 modified relating to data processing, files and freedoms;

Having regard to decree n° 2019-536 of May 29, 2019 as amended, taken for the application of law n° 78-17 of January 6, 1978 relating to data processing, files and freedoms;

Having regard to deliberation no. 2010-456 of December 9, 2010 providing an opinion on a draft decree in the Council of State authorizing the creation of the processing of personal data relating to the management of information and the prevention of security breaches public;

Having regard to deliberation no. 2012-085 of March 22, 2012 providing an opinion on a draft decree amending decrees creating a processing of personal data relating to the prevention of breaches of public security and of a processing of personal data of a personal nature relating to the management of information and the prevention of breaches of public security;

Having regard to deliberation no. 2017-153 of 18 May 2017 giving an opinion on a draft decree modifying several automated processing of personal data of the internal security code; After hearing Mrs. Sophie LAMBREMON, commissioner, in her

report, and Mrs. Nacima BELKACEM, Government Commissioner, in her observations, Issues the following opinion: The processing of Information management and prevention of breaches of public security (GIPASP), implemented by the general management of the national gendarmerie (DGGN) , makes it possible to collect, store and analyze information concerning persons whose individual or collective activity indicates that they may jeopardize public security. More specifically, it targets people likely to be involved in actions of collective violence, in particular in urban areas or during sporting events.

In general, the Commission notes that the GIPASP processing, on which it has had to rule on several occasions, has strong similarities with the processing of the prevention of breaches of public security (PASP), implemented by the general management of the national police.

The planned changes aim to modify the purposes of the processing in order to include attacks on State security and on the integrity of the territory or the institutions of the Republic, to broaden the data that may be subject to of a collection and in particular to mention the recording of data from third-party files as well as to extend the list of persons likely to access the processing or to have communication of information recorded there. The draft decree also modifies the provisions applicable to the rights of data subjects, in order to take account of changes in the regulations on the protection of personal data.

In this context, the Commission notes that the draft decree submitted to the Commission for its opinion aims to make it possible to take into account the development of certain practices in the use of this processing and, in doing so, to regularize them.

Finally, it takes note of the information provided by the Ministry according to which the GIPASP processing, implemented for the purposes of preventing threats to public security within the meaning of the aforementioned Directive 2016/680, also partly concerns the security of the State. It follows from the evolution of the legal framework relating to the protection of personal data that the provisions applicable to the processing of data appearing within this system and concerning State security, are excluded from the scope of application of the directive 2016/680 and fall specifically under articles 1 to 41 and 115 to 124 of the law of 6 January 1978 as amended. Finally, insofar as the data mentioned in I of article 6 of this same law are likely to be recorded, the modification of the GIPASP processing must be the subject of a decree in Council of State, taken after opinion reasoned and published by the Commission.

The draft decree submitted for opinion to the Commission calls for the following observations.On the extension of the scope of the processingIn the first place, article 1 of the draft decree aims to extend the scope of the harms that the processing aims to

prevent, to those relating to state security. It also specifies that the processing may in particular relate to persons likely to take part in terrorist activities, or to undermine the integrity of the territory or the institutions of the Republic.

The Commission takes note of the details provided by the Ministry according to which this modification aims in particular to regularize the scope of use of the processing, and, more generally, is part of the growing development of intelligence activity in connection with the prevention terrorism or radicalization, in light of a particularly significant threat. In this respect, article 1 of law n° 2009-971 of August 3, 2009 relating to the national gendarmerie specifies that it contributes to the mission of intelligence and information of the public authorities, to the fight against terrorism, as well as the protection of populations. In this context, the Commission notes that, according to the Ministry, the GIPASP processing constitutes an important tool for collecting information.

Without calling into question the relevance of these elements, it nevertheless notes that the GIPASP processing aims to prevent attacks of a very diverse nature which may therefore relate to actions or individuals not necessarily being likely to affect the security of the state. In this context, it emphasizes that the processing only partly concerns State security.

In view of the foregoing, and in this context of a mixed file falling under both Titles III and IV of the law of 6 January 1978 as amended, the Commission considers it essential that measures be implemented to make it possible to distinguish specifies the data intended to be processed for purposes relating to State security. In this respect, it takes note of the clarifications provided by the Ministry according to which a mechanism of keywords (known as tags) is intended to be associated with the titles of certain sheets, by taking up the major themes followed by the DGGN, making it possible to discriminate between records under the different regimes.Secondly, article 1 of the draft decree provides that the persons likely to be recorded in the processing may be natural persons, legal persons, as well as groups.

Although the Commission notes that this distinction does not appear in the provisions in force of the Internal Security Code (CSI), it takes note of the justifications provided by the Ministry on the relevance of the collection of such data with regard to the security risk. public or State security that legal persons or groups may represent, or resulting from the link maintained with a person who himself presents a risk. It also notes that they will be the subject of a specific sheet within the processing separate from those relating to natural persons. In this context, it considers that this extension does not call for any particular observation. On the collection of data from other files and the planned reconciliations

Article 2 of the draft decree provides for the collection of new categories of data and, in particular, the recording of information

resulting from the query or consultation of other files as well as the addition of the mention of the registration of the data subject in another treatment.

The Commission thus notes that a distinction is made between the information recorded under a category of data and the mention of the registration of a person within a processing operation (for example, person known to the TAJ). It notes that this precision results from the fact that the registration or not of a person in a processing operation constitutes information in itself.

Firstly, the Commission notes that many categories of data such as the situation with regard to the regulations of entry and stay in France , arms and related titles , means of travel , incarceration measures or even search sheets will be manually fed by other processing. These files are: the application for managing the computerized register of owners and possessors of weapons (AGRIPPA), the application for managing the files of foreign nationals in France (AGDREF), the automated processing of personal data relating to foreigners requesting the issue of a visa called VISABIO, the processing relating to passports and national identity cards (TES), the national system of driving licenses (SNPC), the vehicle registration system (SIV), the processing records (TAJ), the file of wanted persons (FPR), the file of stolen objects and vehicles (FOVeS), the automated processing of personal data known as FSPRT, the computerized processing system for traffic tickets and authorizations in the civil aviation sector and a portal for filing dematerialized applications (STITCH).Secondly, article 2 of the draft decree provides that the object of a collection in the treatment the indication of the registration or not of the person in the following treatments […]:- the treatment of judicial antecedents (TAJ);

- the national computer system N-SIS II mentioned in articles R. 231-5 and following of the CSI;
- the processing of prevention of breaches of public security (PASP) mentioned in articles R. 236-11 et seq. of the CSI;
- the file of wanted persons (FPR);
- the automated processing of personal data called FSPRT;
- file of stolen objects and vehicles (FOVeS).

As a preliminary point, the Commission takes note of the clarifications provided by the Ministry according to which there is no automated interconnection between these processing operations and that only agents expressly and individually authorized to consult these files record in the GIPASP processing the data concerned. Firstly and in general, it recalls the importance of ensuring that only the processing operations comprising relevant, adequate and necessary data with regard to the purposes of the GIPASP processing are consulted, and this, in compliance with the provisions applicable to reconciled files. More

specifically, with regard to TES processing, it considers that particular vigilance will have to be implemented, taking into account in particular the nature and volume of data recorded therein.

Similarly, the Commission considers that particular attention should be paid to the methods of data collection, which are likely to entail particular risks for the persons concerned, due for example to the incorrect collection of data concerning them and this , due to their manual registration in the processing. The ministry specified that this point will be the subject of a reminder within the employment doctrine relating to treatment.Secondly, it considers that given the particularly sensitive nature of some of these treatments, a fortiori those dispensed of publication or concerning the security of the State, measures must imperatively be implemented in order to ensure the effective updating of the data thus preserved.Thirdly, without calling into question the need to collect data allowing the prevention threats to public security, State security, or the monitoring of persons likely to take part in terrorist activities and, to this end, to consult the processing thus referred to, the Commission considers that it would have been highly desirable to modify the regulatory acts governing the files concerned in order to explicitly mention that they can be reconciled with GIPASP processing.

In the same way, if all the categories which are intended to be supplied by this processing are mentioned exhaustively in article 2 of the draft decree, the Commission considers that the draft act could also have explicitly mentioned the files actually consulted allowing to feed these categories. Insofar as the processing operations concerned have been identified exhaustively and in order to avoid, in practice, the use of other processing operations, it invites the Ministry to supplement the draft decree on this point. On the collection of data relating victims and people in regular and non-accidental contact with the person or group monitored

As a preliminary point, the Commission notes that Article R. 236-22 of the CSI already provides for the collection of data relating to persons maintaining or having maintained direct and non-incidental relations with the person concerned. Article 2 of the draft decree therefore intends to specify the data that may be collected in this respect and limit the cases in which they may be recorded.

Article 2 of the draft decree also provides that data relating to the victims of the actions of the person likely to harm public security or the security of the State, may, in certain limited cases, be subject to of a collection within the processing.

The draft decree exhaustively lists the data likely to be recorded in the processing. In this respect, the Commission takes note of the clarifications provided by the Ministry according to which each piece of information will be collected strictly insofar as it is

necessary for the monitoring of the person and, more particularly, for the reasons for registration in the processing of the person being tracked.

The Commission notes that the draft decree expressly limits the collection of data relating to these persons to certain categories of information. The ministry has also specified that this information will be mentioned in the body of the information sheets. Thus the victims cannot be the subject of a specific file. In this context, it has also been clarified that the doctrine will specifically require that only the necessary information be mentioned, by explicitly specifying the reason for its recording.

Finally, it is noted that this data cannot be subject to screening in the context of carrying out administrative investigations, for example.

In this context, the Commission considers it essential that the criteria relating to the necessity of collecting data relating to these categories of data, as described by the Ministry, are strictly respected. Under these conditions only, the Commission considers that the collection of this information is legitimate, with regard to the purposes of the processing, and in accordance with article 4-3° of the law of January 6, 1978 as amended. It also recalls that it may be called upon to check compliance with these terms of implementation.

Insofar as these data are intended to be kept for the same duration as the information relating to the person being monitored, it stresses the importance of ensuring strict control of these durations, and more specifically in the hypothesis of the collection of information relating to minors. In this respect, it recalls the obligation imposed on the Director General of the National Gendarmerie to present to the Commission each year a report on his activities for checking, updating and erasing the data recorded in the processing, and in particular those relating to minors. The Commission considers that this guarantee is an important measure making it possible to contribute to compliance with the principles relating to data protection. On the possibility of carrying out a search based on the photograph Article 2 of the draft decree provides for the possibility of carrying out a search based on the photographs recorded in the treatment.

In this respect, the Commission notes that, in the state of the developments communicated by the Ministry, the questioning by photograph must constitute a new possibility of questioning the processing (like the name), which has not intended to replace the methods of consultation of the treatment currently implemented. It takes note of the clarifications made according to which this device must only allow the query of the GIPASP processing for the purpose of determining whether the person whose photograph is submitted is already in the processing, thus constituting only an aid to the identification of the nobody. In this

respect, it also acknowledges that other applications cannot be queried based on this photograph.

The Ministry also specified that the result of the interrogation will be cross-checked with other elements in the possession of the service allowing the identity of the individual to be confirmed (such as, for example, the particular physical signs known) and may serve as a basis for further research of National Gendarmerie personnel. A positive result will in no way be sufficient on its own to base a decision with regard to the person, and no direct consequences will affect the person concerned.

It also notes that the draft decree explicitly excludes this possibility with regard to persons maintaining or having maintained a link with persons liable to jeopardize public security or the security of the State, as well as the victims, the treatment not allowing it.

Although the Commission takes note of all the clarifications provided by the Ministry, it nevertheless notes that this functionality has not yet been developed in the application and that it is only a project. Without calling into question the principle of the implementation of such a device, it wonders, in the absence of details on this point, about the technical characteristics of the future device and about the data that will be necessary for its operation. It considers in particular that, in the event that the device uses a biometric template, this would in itself constitute data falling within a category distinct from those listed in the draft decree. In this case, the deployment of this mode of querying the file would therefore require the modification of article R. 236-22 of the internal security code, after referral to the Commission, under the conditions provided for in article 31 of the law of January 6, 1978 as amended.

In any case, it asks to be made the recipient of any element allowing to assess the methods, in particular technical, of implementation of this functionality, as well as the impact analysis relating to the private life of the data made available. up to date, before its effective implementation. It recalls that it will not fail to make use, if necessary, of its powers of control, pursuant to article 19 of the law of January 6, 1978 as amended.On the rights of the persons concernedIn the first place, article 8 of the draft decree specifies that the rights of individuals are exercised differently depending on whether or not the data is of interest to State security. The character of a mixed file, concurrently coming under titles III and IV of the law of January 6, 1978 as amended, leads to a particular complexity in the procedures for exercising rights. However, the Commission recalls that the exercise of the rights of individuals, and in particular the possibility of requesting access to the data concerning them, constitutes an important guarantee with a view to preventing breaches of their privacy.

In the present case, on the one hand, for data considered to be of interest to State security, the rights of access, rectification

and erasure of recorded data are exercised with the Commission, under the conditions laid down in article 118 of the law of January 6, 1978 as amended.

On the other hand, for other data, the rights of information, access, rectification, erasure and limitation are exercised directly with the general management of the national gendarmerie.

The Commission notes that these rights may be subject to restrictions, in order to avoid hampering investigations, research or administrative or judicial proceedings, to avoid harming the prevention or detection of criminal offences, investigations or prosecutions in this area or the execution of criminal sanctions or to protect public security and national security, pursuant to 2° and 3° of II and III of article 107 of the law of January 6, 1978 modified. Given the purpose of the processing, the limitation of these rights, which are exercised in this case with the Commission under the conditions provided for in Article 108 of the same law, does not call for any particular observation.

On the other hand, the Commission considers that the proposed provisions do not make it possible to link the data concerned exclusively to the purpose for which they are processed. Consequently, these provisions do not allow the persons concerned to determine with certainty the methods according to which they can exercise their rights.

In this respect, it notes that the Ministry has assured it that the data covered by the specific regime for processing involving State security will be identified as such in the file. The Commission considers that the implementation of specific markers, or an equivalent device, should make it possible to precisely determine the data considered to be of interest to State security, on the basis of precise criteria. Such identification is likely to allow the data controller to whom a request for the exercise of rights is made on the basis of Title III of the amended law of 6 January 1978 to exclude from his response only the data identified in advance, and on the basis of specific criteria, as falling under the Title IV regime. Since this is an essential method of exercising rights in the presence of a file falling under both Title III and Title IV of the law, the Commission considers that the decree should specify that the Title IV data are identified as such in the file.

In any case, it considers that in the absence of provisions or measures allowing an objective identification of the data excluded from the right of direct access, the application of the provisions of title III of the modified law of January 6, 1978 should prevail.Secondly, article 8 of the draft decree provides that the right of opposition does not apply to this processing, which does not call for observation.Thirdly, it is emphasized that the court competent to deal with litigation related to the exercise of rights differ depending on whether or not the data is of interest to State security. Article 7 of the draft decree therefore modifies the

provisions of article R. 841-2 of the CSI in order to provide for the competence of the Council of State for data concerning State security. With regard to other data, and without the text having to provide for it, jurisdiction lies with the administrative court of Paris. The Commission draws the Ministry's attention to the complexity of this distribution and considers that an overall reflection could be carried out in order to clarify the distribution of litigation between the Council of State and the Paris administrative tribunal. On the changes made to the other conditions for implementing the processing On the data collected

As a preliminary point, the Commission notes that the wording of certain categories of data is particularly broad. While it does not question the difficulty of specifying exhaustively all the data that may be collected in this respect, particularly with regard to the operational requirements specific to each situation, it nevertheless considers that in certain respects, the draft decree could be clarified in order to define more precisely what these categories overlap. Firstly, article 3 of the draft decree provides that health data revealing a particular danger or vulnerability may be collected . As such, data relating to known or reported psychological or psychiatric disorders insofar as these data are strictly necessary for the assessment of the dangerousness may be collected.

In this respect, the Commission notes that the information thus collected is limited to the description of the disorders and the possible psychiatric follow-up of a person, to the exclusion of any data provided by a health professional subject to medical secrecy.

It nevertheless recalls that the mention of this information is of a sensitive nature. Indeed, this information constitutes health data within the meaning of the regulations applicable to the protection of personal data, which must be subject to increased vigilance. If the collection of this data does not call for any particular observation, it emphasizes that any information which would be covered by medical secrecy should, in addition, benefit, unless otherwise provided, from the protection provided for in Article L. 1110- 4 of the public health code. Secondly, article 2 of the draft decree provides that the identifiers used on social networks or activities on social networks may be the subject of collection within the processing.

In this respect, the Commission takes note of the clarifications provided by the Ministry according to which all social networks are concerned in the context of open source research, and that the data are therefore collected on pages or accounts opened. Furthermore, the identifiers used correspond for example to the pseudonym of the person concerned to the exclusion of the associated password. It also notes that data may also be collected under the conditions provided for in Article L. 863-1 of the CSI. It emphasizes that if data concerning other people may be collected, it acknowledges that the information sheets will not

mention these third parties and that only the attachments to these sheets will show these pseudonyms or identifiers.

Without calling into question the details provided by the Ministry, the Commission considers that the provisions of the draft decree do not allow a clear and precise understanding of the nature of the data likely to be recorded in this respect, nor of the methods of this collection, which may, for example, refer to different realities depending on the confidentiality policy of the network concerned. It asks that the draft decree be clarified in this sense, and considers that it should also explicitly exclude the possibility of automated collection of this data.

Subject to these reservations, the Commission considers that the collection of this data is relevant with regard to the purposes of the processing, and in accordance with article 4-3° of the law of January 6, 1978 as amended. Thirdly, article 2 of the draft decree provides that the actions likely to receive a criminal qualification, the legal consequences as well as the legal history (nature of the facts and date) could be the subject of a recording within the treatment.

The Commission takes note of the clarifications provided by the Ministry according to which the information likely to be collected in this respect may relate in particular to investigations, information resulting from inspections of the public highway or even the procedures relating to the judicial follow-up of the person concerned. (prohibition of presence in a city, for example).

The Commission stresses that it had already taken note, in its deliberation no. 2010-456 of December 9, 2010, that the actions likely to receive a criminal qualification will refer to facts and in no case to criminal convictions. It recalls that the collection of data relating to the aforementioned categories may in no case relate to judgments or judgments of convictions, in accordance with the provisions of article 777-3 of the code of criminal procedure. About the recipients

Article 6 of the draft decree provides for extending the list of persons who may have communication of information recorded in the processing. It provides that, within the limit of the need to know, the recipients of the data recorded in the processing may be: - the persons having authority over the services or unit having access to the data recorded in the processing, in accordance with the provisions in force of the article R. 236-16 of the CSI;

- public prosecutors;

- the agents of a national police service or a national gendarmerie unit in charge of an intelligence mission and the agents of the services mentioned in articles R. 811-1 and R. 811-2 of the CSI, with authorization express;

- the personnel of the national police or the soldiers of the national gendarmerie who are not in charge of an intelligence

mission on express request, specifying the identity of the applicant, the object and the reasons for the consultation. If the possibility of transmitting the information resulting from the processing to all of these people is justified with regard to both the missions of these services and the purposes of the GIPASP processing, the Commission considers, however, that the draft decree could have detailed more precisely the data which can actually be forwarded to them, particularly with regard to those relating to the victims. In this regard, the Ministry specified that the processing manager does not transmit data that is not related to the request made, in strict compliance with the right to know (leading to the absence of communication of data relating to victims for example), and undertakes to mention this point in the treatment use doctrine.

Finally, it considers, with regard to personnel of the national police or soldiers of the national gendarmerie who are not in charge of an intelligence mission, that the use of the term consultation appearing in the draft decree seems to infer that they have direct access to treatment. It takes note of the ministry's commitment to modify the draft decree on this point. On security measures

The Commission points out that, given the nature of the data, and for reasons of defense in depth, encryption measures in accordance with appendix B1 of the general security reference system must be implemented, both at the level of the databases active, communications, log data, backups.

With regard to the authentication methods, the Commission takes note of the possible use of an identifier associated with a password or of an agent card associated with a PIN code, of the future transition to access exclusively by agent card and PIN code, as well as the Ministry's commitment to ensure a level of security that meets the standards or strong authentication guidelines. It also recommends following up on its deliberation 2017-012 of January 19, 2017 on the adoption of a recommendation relating to passwords.

Article 7 of the draft decree provides that the operations of collection, modification, consultation, communication, transfer, interconnection and deletion of personal data and information are subject to recording, and that these data are kept for a period of six years.

As a preliminary point, the Commission underlines that insofar as the processing is not the subject of interconnections but only reconciliations, under the conditions previously developed, the Ministry has undertaken to modify the provisions of the draft decree in meaning, and this, for the purpose of clarity of the device.

With regard to the retention period for log data, the Commission recalls that the sole purpose of collecting this data is the

detection and/or prevention of illegitimate operations on the data. The duration of storage of these traces must be fixed in a manner proportionate to this sole purpose. In addition, it emphasizes that these data must not under any circumstances provide information on data whose retention period has expired.

The Commission takes note of the data quality control measures carried out by the SSOR for the entity sheets (FIE), the RENS cells for the simplified information sheets produced by the elementary units (FRS), as well as by the RENS offices for the information (FRE/FREC) produced by the RENS cells.

Finally, with regard to the measures making it possible to ensure integrity, the Commission recommends that a data fingerprint with a hash function in accordance with appendix B1 of the general security reference system be used.

The other security measures do not call for comments from the Commission.

The president,

M. L. Denis