Deliberation 2020-066 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: CNIX2033726VDeliberation n° 2020-066 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 "Administrative investigations related to public security" (request for opinion no. 19013317)The National Commission for Computing and Liberties,

Seizure by the Minister of the Interior of a request for an opinion concerning a draft decree modifying the provisions of the internal security code relating to the processing of personal data called Administrative investigations related to 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. 236-1 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. 2010-427 of November 25, 2010 giving an opinion on a draft decree in Council of State amending decrees no. 2009-1249 and no. 2009-1250 of October 16, 2009 creating personal nature respectively relating to the prevention of breaches of public security (PASP) and to administrative investigations related to public security (EASP);

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 administrative investigations related to public security (EASP), implemented by the central directorate of public security and the police headquarters, makes it possible to facilitate carrying out administrative investigations by means of the collection and use of information necessary to respond to requests devolved to territorial intelligence in accordance with the

provisions of Articles R. 114-2 to R. 114-5 of the Internal Security Code (CSI).

This processing, on which the Commission has already ruled on several occasions, aims to ensure the reliability of investigations carried out by cross-checking at national level information collected, archived and used to respond to requests for administrative investigations, in the purpose of determining whether or not the behavior of the person concerned is compatible with the exercise of the functions or missions envisaged.

The draft decree aims to make it possible to take into account the evolution of certain practices in the use of this processing and, in doing so, to regularize them. The Commission notes that while the scope of the administrative inquiries covered by the provisions relating to EASP processing is not subject to change, the draft decree intends to specify the purposes of the processing, allow the collection of new data and, in particular those resulting other treatments. Finally, the draft decree modifies the provisions applicable to the rights of the persons concerned, in order to take into account the evolution of the regulations regarding the protection of personal data.

The Commission takes note of the information provided by the Ministry according to which the EASP processing, implemented for the purpose of carrying out administrative investigations, falls under the provisions of Directive 2016/680, and is partly of interest to State security. 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 EASP processing must be the subject of a decree in Council of State, taken after opinion reasoned and published by the Commission. On the scope of the processing and the applicable legal regime

Generally speaking, the Commission observes that the last few years have been marked by the successive implementation of new administrative investigation mechanisms, demonstrating a significant broadening of the latter's scope of intervention. It recalls that particular vigilance is required with regard to these systems which aim to strengthen the controls carried out in particular to prevent the carrying out of terrorist attacks or acts likely to undermine State security. The Commission considers that the carrying out of administrative inquiries must be accompanied by strong guarantees to ensure that the inquiries thus carried out, which lead to the processing of particularly sensitive data on an increasingly large number of people, do not no excessive interference with the right to respect for the private life of the persons concerned.

Article 1 of the draft decree aims to specify that the administrative inquiries that may be carried out within the framework of the EASP processing, may in particular take into account the threat that the persons who are the subject of them represent for public security or the safety of the state.

The Commission takes note of the justifications provided by the Ministry according to which the carrying out of some of the investigations referred to lead to the questioning of files, some of which contain data of interest to State security, and that, therefore, the EASP processing falls part of the provisions of title IV of the law of January 6, 1978 as amended.

It notes that the proposed modification, which aims to specify that the threat to public security or State security may in particular be taken into account, is only intended to constitute an object for the main purposes of the processing. Although it considers that this clarification alone is not such as to allow it to be considered that the processing partly falls under the provisions relating to Title IV of the law of 6 January 1978 as amended, it considers that due to the nature of some of the investigations that can be carried out (and in particular concerning access to protected areas) as well as the characteristics of the processing that can be consulted in the context of carrying out these investigations, the processing is likely to fall, in part, on the security of the state.

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 in order to make it possible to distinguish precisely the data intended to be processed. for purposes relating to State security. It also recalls that the investigations referred to in Article L. 114-1 of the CSI condition the adoption of numerous administrative decisions, very diverse and not all presenting the same degree of sensitivity. The Commission points out that while the provisions relating to EASP processing do indeed refer to the investigations provided for in Articles L. 114-1, L. 114-2, L. 211-11-1 of the CSI and in Article 17-1 of the Law No. 95-73 of January 21, 1995, no precision as to the scope of the system is provided by this draft decree, particularly with regard to the surveys specifically targeted in this context. On the collection of data from other files and projected 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 recording 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 forms 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 national driving license system (SNPC), the vehicle registration system (SIV), the processing of criminal records (TAJ) and the file of wanted persons (FPR), the Schengen information system (SIS), the file of stolen objects and vehicles (FOVeS), processing of information management and prevention of breaches of public security (GIPASP), processing of information management and prevention of breaches of public security (GEDRET), automated processing of personal data referred to as FSPRT, processing for the prevention of attacks on public security (PASP).Secondly, article 2 of the draft decree provides that the indication of the recording nt or not of the person in the following processing […]:- the processing of criminal records mentioned in Articles R. 40-23 et seq. of the Code of Criminal Procedure (TAJ);

- the national computer system N-SIS II mentioned in articles R. 231-5 and following of the CSI;

- the automated processing of personal data called Prevention of breaches of public security (PASP);

- processing information management and prevention of breaches of public security (GIPASP);

- the file of wanted persons provided for by decree no. 2010-539 of 28 May 2010 (FPR);

- the automated processing of personal data called FSPRT;

- the 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, access to the files consulted is by expressly and individually authorized territorial intelligence agents, at the means of the surname, first name and date of birth of the person concerned by the administrative enquiry. All of these files are not interconnected with EASP processing.

In general, it recalls that it is important to ensure that only processing operations containing relevant, adequate and necessary data with regard to the purposes of the EASP processing are consulted. 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.
Furthermore, it considers that, given the particularly sensitive nature of some of these processing operations, a fortiori those

exempted from publication or involving State security, measures must imperatively be implemented in order to ensure the updating effective data stored in this way.

Without calling into question the need to collect data allowing the prevention of attacks on public security, State security, or even 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 the EASP 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 in an exhaustive manner and in order to avoid, in practice, the effective use of other processing operations, it invites the Ministry to supplement the draft decree on this point. On the data collected

The Commission notes that the draft decree aims to very significantly extend the list of categories of data likely to be collected. In this respect, information relating to the activities and behavior of the person concerned, his or her movements, or elements relating to an incompatibility factor with regard to the request made may, for example, be recorded in the processing (such as follow-up for radicalization, criminal history or self-aggressive behavior).

In general, although the collection of a large part of this data does not call for comment, the Commission notes that the wording of certain categories of data is particularly broad. Without calling into question the difficulty of specifying exhaustively all the data that can be collected in this respect with regard to the operational requirements specific to each situation, it nevertheless considers that, with regard in particular to categories relating to behavior, movements or even sporting practices, the draft decree could be clarified in order to define more precisely what these categories overlap. Firstly, article 2 of the draft decree provides that the identifiers used on social networks as well as the activities on social networks may be collected.

In this regard, the Commission takes note of the clarifications provided that the identifiers used on social networks are either provided by the person under investigation, or sought from open sources by the investigator, excluding associated passwords. Furthermore, only information put online voluntarily by its owners in open source, without it being conditioned to a particular access, may be consulted and collected. Although the collection of other information is categorically excluded, the Commission notes that data may also be collected under the conditions provided for in Article L. 863-1 of the CSI. In any event, isolated

comments made on a social network cannot be sufficient to justify an unfavorable decision.

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. Secondly, article 3 of the draft decree provides that information relating to health data insofar as such information reveals a particular danger or vulnerability may be subject to collection. As such, data relating to known or reported psychological or psychiatric disorders insofar as these data are strictly necessary for the assessment of incompatibility may be collected.

In this regard, the Commission notes that the information thus may come from the processing of prevention of breaches of public security (PASP) or processing allowing the electronic storage, management and use of documents of the services of the Ministry of interior in charge of territorial intelligence missions (GEDRET). It also notes that no research based on this data can be carried out.

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. It emphasizes that any information that 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.Thirdly, Article 2 of the draft decree provides that the actions liable to receive criminal qualification, the legal consequences as well as the legal history (nature of the facts and date) may be subject to recording within the processing.

In this regard, the Commission recalls that the collection of data relating to the aforementioned categories may in no case relate to judgments or convictions, in accordance with the provisions of Article 777-3 of the Code of Criminal Procedure. made to the methods of processing certain categories of dataIn the first place, article R. 236-2 of the CSI in its current wording provides that photographs may be collected. In this respect, Article 2 of the draft decree expressly provides that the processing does not include a facial recognition device based on the photograph, which the Commission takes note of. Secondly, it notes

that the provisions in force of Article R. 236-2 of the CSI, specify that the processing only allows automated searches based on the data mentioned in 1° and 2°, which the draft decree intends to remove. The Commission considers that this clarification constitutes an important guarantee, particularly in view of the evolution of the volume of data that can be processed. It takes note of the ministry's commitment to modify the draft decree in order to reinstate this guarantee.On the rights of the persons concernedFirstly, article 5 of the draft decree specifies that the rights of persons are exercised in a different way 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 police.

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 considers that the implementation of specific markers, or an equivalent device, could make it possible to precisely determine the data considered to be of interest to State security, on the basis of precise criteria. Such identification would be such as to allow the controller receiving a request to exercise rights on the basis of Title III of the law of January 6,

1978 as amended, 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 modality for the exercise of 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 also to specify.

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 law of January 6, 1978 as amended, should prevail.

Finally, with regard to the information of the persons concerned, the Commission notes that any person interviewed in the context of carrying out an administrative inquiry to access the functions of police officer, but also for applications for naturalization by declaration, is informed of the registration of his personal data in the EASP processing by submitting an information form. In addition, and in general, the information of the persons concerned is carried out by the publication of the regulatory act as well as by the publication on the website of the Ministry of the Interior of the list of all the processing operations that it implements.Secondly, article 5 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 underlined that the court competent to deal with litigation related to the exercise of rights differs 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. security

The Commission notes that the production of the processing is carried out in a secure environment. However, it considers 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. In addition, to guarantee the partitioning put in place between the EASP processing operating network and the Internet, the Commission recommends stopping the use of administrator workstations accessing both the treatment and the Internet, given the risk that this use is likely to represent.

With regard to the authentication methods, the Commission takes note of the use of an agent card associated with a PIN code as well as of the ministry's commitment to ensure a level of security that meets the standards or benchmarks of strong authentication. It also recommends following up on its deliberation 2017-012 of January 19, 2017 on the adoption of a recommendation relating to passwords.

It also takes note of the data quality control measures carried out on their records recorded in the processing.

Article 4 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 stresses 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 of logging 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.

Finally, the Commission takes note of the implementation of measures to ensure the integrity of the processing data. In this respect, it recommends that a fingerprint of the processing data 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