

National Data Protection Commission

OPINION/2023/16

## I. Order

1. The Minister of Justice requested the National Data Protection Commission (CNPD) to pronounce on a draft Ordinance, which regulates the inclusion of fingerprints entered in the dactyloscopic file of the criminal identification services of the Directorate-General for the Administration of Justice ( DGAJ) in the Lophoscopic Data Central File, under the responsibility of the Judiciary Police (PJ).

2. The CNPD issues an opinion within the scope of its attributions, as the national authority for the control of the processing of personal data, conferred by paragraph 2 of article 30 and by paragraph c) of paragraph 1 of article 44, all of Law No. 59/2019, of August 8.

3. The CNPD had already issued an opinion<sup>1</sup> on a first draft text, in which it had raised the need for greater clarity and detail in the regulations. The draft Ordinance ("Project") now submitted already contains some specifications in response to the CNPD's observations. In addition, it was accompanied by an explanatory note regarding the practical application of some standards.

## II. Analysis

4. The ordinance in question here aims to implement article 24 of Law no. 27/2015, of May 5, amended by Law no. 14/2022, of August 2 - Criminal Identification Law (LIC ), which provides for the regulation in a specific diploma of the integration of fingerprints collected from convicted defendants and registered in the dactyloscopic file of the criminal identification services<sup>2</sup> in the criminal information system of the Judiciary Police.

5. However, with relevance to the appreciation of this Project, Law No. 67/2017, of August 9, on legal lophoscopic and photographic identification for the purposes of prevention and criminal investigation (LU) came into force, which provides for the creation of a Central Lophoscopic Data File (FCDL), under the responsibility of the PJ, through the Scientific Police Laboratory (LPC), in accordance with paragraph 3 of article 7 of the LIJ.

6. The FCDL contains the fingerprints of those convicted in criminal proceedings and those who cannot be held responsible for whom a security measure has been applied (cf. paragraphs b) and c) of paragraph 1 of article 3 of the LIJ). Also the concept of

fingerprints was extended to include the prints of the 10 fingers of both hands, in two series

1 Opinion/2022/78. from the 16th of August.

2 This also includes persons who are not responsible for whom a security measure has been applied, pursuant to paragraph 2 of article 2 of the LIC.

Av.D. Carlos 1,134,1° 1200-651 Lisbon

T (+351) 213 928 400

F (+351) 213 976 832

geral@cnpd.pt

www.cnpd.pt

PAR/2023/4

1v.

different hands, in a resting position and in a rolled position, and the impressions on the two palms of the hand, in a resting position and in a writer's position (cf. Article 4(4) of the LIJ). This also resulted in the amendment introduced to the LIC by Law No. 14/2022, which also specified what fingerprints are for the purpose of criminal identification and, therefore, the type of data that now appears in the dactyloscopic file of defendants convicted, under the responsibility of the DGAJ (cf. Article 2(3) of the LIC).

i. The integration of files and the flow of personal data

7. The draft Ordinance establishes that the fingerprints of convicted defendants, collected by the courts and transmitted electronically, to the criminal identification services for integration in their dactyloscopic file, are stored on the AFIS3 platform (Fingerprint Identification System) of the PJ. And that such storage is done in a reserved area of the repository, (cf. paragraphs 1 and 2 of article 2 of the Project).

8. In the explanatory note that accompanied the Project, it is clarified that what is intended is to integrate the biometric data that are currently collected on paper into the AFIS platform. It is also stated that it does not make sense to have two AFIS systems, avoiding redundancies and repeated preservation.

9. In Article 4 of the Project, it is foreseen that the integration of fingerprints in the FCDL is carried out electronically, through a secure connection between the SICRIM systems of the DGAJ and the FCDL of the LPC of the Judiciary Police.

10. From the combined reading of the two Project norms, it can be concluded that the dactyloscopic file of convicted defendants, currently existing in the DGAJ, transits in its entirety, through the Justice computer network maintained by the IGFEJ, to a dedicated area of the FCDL. With this block data transmission, the desired integration of a file into another file would be achieved, in accordance with Article 24 of the LIC.

11. However, it is not just about integrating fingerprint files, but also about redesigning the information flow in the future. Indeed, the fingerprints of convicted defendants, to be collected by the courts, will no longer be transmitted to the DGAJ's criminal identification services, but will be transmitted directly to the FCDL. It may even be the case that it is not necessary to collect fingerprints because they are already included in the FCDL, which implies a direct consultation with the AFIS in the legal entity to verify the existence or not of correspondence with a previously inserted sample (cf. no. 5 of article 2 of the Project).

3 AFIS- Automated Fingerprint Identification System.

PAR/2023/4

two

National Data Protection Commission

12. If this reading is correct, the CNPD understands that these are two different plans and that they must be foreseen differently in the ordinance. On the one hand, the personal data processing operation consisting of the integration of the dactyloscopic file currently maintained by the DGAJ; on the other hand, how the flow of information will be processed from now on (when fingerprints are collected and when this is not necessary) from the court to the FCDL.

13. Since the fingerprints contained in the dactyloscopic file under the responsibility of the DGAJ must be stored in a reserved area of the FCDL, it is essential that the regulations duly foresee how the fingerprints of (until then) suspects are segregated from the common area of the FCDL - let's call it that - for the dedicated area of the dactyloscopic file of the DGAJ, whenever there is no room to collect new fingerprints because they are already in the AFIS of the Judiciary Police.

14. Furthermore, since article 4 of the Project only provides for security in terms of file integration, reference should be added to the transmission of fingerprints from the courts to the FCDL.

15. In short, the ordinance must differentiate, possibly in different articles, the norms relative to the integration of dactyloscopic files, including security measures, from the new data flows that will be created, from the collection of fingerprints in the courts

to the its storage in the reserved area of the DGAJ of the information repository that is the FCDL, adding in this context the norms currently provided for in paragraphs 5 and 7 of article 2 of the Project.

16. It is also suggested, for the sake of clarity, the autonomy of data processing in terms of access to fingerprints, currently described in paragraphs 2, 4 and 6 of article 2 of the Project.

ii. The legality of integrating the dactyloscopic criminal identification file into the FCDL

17. Article 24 of the LIC admits the possibility of integrating the fingerprints entered in the dactyloscopic file of convicted defendants from the DGAJ's criminal identification services into the information system of the Judiciary Police. On the other hand, paragraph 8 of article 7 of the LIJ provides that the FCDL is also provided with information from criminal identification services, under the terms of paragraph 5 of article 4, that is, the samples- references collected from convicted and non-imputable defendants to whom security measures have been applied, under the terms of the LIC, are transmitted electronically to the FCDL.

18. In this sense, the CNPD understands that there is a legitimacy basis for the transmission of fingerprints collected in the courts for the purposes of criminal identification, under the terms of the LIC, to the FCDL maintained by the Judiciary Police, based on paragraph 1 of article 5. ° of Law No. 59/2019, of August 8.

Av. D. Carlos 1,134,1o 1200-651 Lisbon

T (+351) 213 928 400

F (+351) 213 976 832

geral@cnpd.pt

www.cnpd.pt

PAR/2023/4

2v.

iii. Responsibility for the processing of personal data

19. The DGAJ is, under the terms of article 38 of the LIC, responsible for the criminal identification databases, which include the dactyloscopic file of convicted defendants referred to in article 19 of the UC, guaranteeing the rights of data subjects and ensure the legality of data queries.

20. The Judiciary Police, through the Scientific Police Laboratory<sup>4</sup>, is responsible for the FCDL, pursuant to Article 7(3) of the

LU. In accordance with paragraphs 4 and 5 of the same article, it also guarantees the quality of the data and the legality of data queries.

21. The text of the Project provides that the criminal identification services of the DGAJ have access to the fingerprints stored in the reserved area of the FCDL, for the purposes of updating, rectifying and deleting the stored information (cf. paragraph 4 of article 2. ).

22. On the other hand, it is the PJ that provides online access to the FCDL and manages AFIS users, in accordance with the provisions of article 7 and article 18 of the LIJ, as well as it is the PJ that the obligations proper to a data controller are assigned to ensure the exercise of the rights of holders, as follows from article 15 of the LIJ.

23. It is therefore evident that there is an overlapping of responsibilities and legal powers, resulting from a certain conflict between two diplomas, which stands out in the implementation of the integration of the DGAJ dactyloscopic file in the AFIS platform of the Judiciary Police. This had already been signaled by the CNPD in its previous Opinion.

24. Naturally, the argument set out in the explanatory note regarding the need for two AFIS is accepted, moreover when the entities authorized to access the fingerprints of convicted defendants are almost the same. And the national legislator clearly opted to include in the FCDL the fingerprints of convicted defendants, collected in the courts, in a diploma subsequent to the LIC. Furthermore, it has very recently introduced changes to the UC to specify that fingerprints contain palm prints, which means a clear alignment with the judicial identification legislation.

25. The CNPD understands that, in practice, there is a joint responsibility that results from the combination of the two legal diplomas - the criminal identification law and the judicial identification law - between the DGAJ and the PJ in what

4 The LPC is a central unit of specialized technical-scientific support of the Judiciary Police, as a result of the new organic structure of the PJ, approved by Decree-Law No. 137/2019, of September 13, in its last wording (cf. Article 18(4)(b)(/)).

PAR/2023/4

3

National Data Protection Commission

concerns the data processed in the reserved area of the FCDL, that is, in relation to the fingerprints of convicted defendants and non-imputable persons to whom security measures have been applied.

26. Therefore, in order to overcome this conflict of rules and bring legal certainty and a consistent application of the law in

terms of protection of personal data, the ordinance should recognize this joint responsibility, which would better reflect the de facto situation of the integration of a file in another. It is true that the responsibilities of each of those responsible do not have to be equivalent, as results from the case law of the Court of Justice of the European Union<sup>5</sup>.

27. A subsequent mutual agreement between those jointly responsible, in accordance with article 22 of Law No. 59/2019, framed by the respective legislation and by the ordinance in question, would make it possible to specify the practical application of that division of responsibilities.

iv. The retention period of the dactyloscopic file of convicted defendants

28. The text of the Project foresees in its article 3 that the fingerprints transmitted by the criminal identification services and integrated in the FCDL are kept for the period of validity of the criminal record to which the file is associated.

29. The LIJ, which regulates the functioning of the FCDL, also determines that the samples collected under that diploma are kept for the period of validity of the criminal record to which the file is associated, in the event of a final condemnatory decision (cf. paragraph b) of Article 9(1).

30. However, paragraph 2 of article 23 of the LIC provides that, once the criminal record has expired, the dactyloscopic information is kept in a specific computer file for a maximum period of five years, and can be accessed by the identification services criminal for the purpose of restoring a registration wrongly canceled or withdrawn, or by a judicial or police authority within the scope of a criminal investigation or criminal proceedings.

31. Now, if the DGAJ no longer has the dactyloscopic file of convicted defendants fully available and both the diploma relating to the functioning of the FCDL and now the ordinance in question provide that the data are only kept for the period of validity of the criminal record, it will not be possible to comply with the rule set out above.

32. From the point of view of personal data protection, the CNPD considers that fingerprints should be eliminated because the purpose of their collection has been fulfilled and their collection is not adequate.

<sup>5</sup> See CJEU Judgment of July 10, 2018, Jehovah's Witnesses, C-25/17, ECLI:EU:2018:551, paragraphs 67-69.

Av. D. Carlos 1,134,1° T (+351) 213 928400 geral@cnpd.pt

1200-651 Lisboa F (+351) 213 976 832 www.cnpd.pt

PAR/2023/4

3v.

maintenance. This was expressed in his statement<sup>6</sup> during the legislative procedure for the new law on criminal identification.

33. However, given that this rule appears in the LIC, and has different accesses in relation to the data kept during the validity of the criminal record, the Draft Ordinance should contain a provision for maintaining the data in a separate computer file.

### III. Conclusion

34. Based on the reasons set out above, the CNPD recommends that changes be made to the text of the Project, in order to:

The. Differentiate in the text of the ordinance the data processing operation that corresponds to the block integration of the dactyloscopic file of convicted defendants, maintained by the criminal identification services of the DGAJ, from the new flow of data that will occur in the future between the courts, the FCDL and the DGAJ, explaining how the respective interactions are processed and indicating how the change in the category of data subject from 'suspect' to 'convict' is reflected at the database level and the logical segregation of biometric data, which "transit" to a reserved area of the repository.

B. Autonomize the conditions for access to fingerprints processed in the reserved area of the FCDL, relating to the dactyloscopic file of convicted defendants, provided for in article 19 of the LIC.

w. Recognize that there is a joint responsibility between the DGAJ and the PJ regarding the personal data processed in the reserved area of the information repository that is the FCDL, that is, with regard to the fingerprints of convicted defendants and persons who cannot be held responsible security measures applied.

Lisbon, February 20, 2023

Filipa Calvão (President, who reported)

<sup>6</sup> Opinion 12/2015, of February 3, 2015.