

” NATIONAL DATA PROTECTION COMMISSION

I. ORDER

OPINION/2020/41

By order of the Assistant Secretary of State and Internal Administration, an opinion was requested from the National Data Protection Commission (CNPd) on the authorization request submitted by the National Director of the Public Security Police (PSP) for the “use of portable video cameras for image capture, namely to protect the safety of people and property, public or private, and to prevent the practice of acts qualified by the Law as crimes, in places where there is a reasonable risk of their occurrence, as well as for control and enforcement purposes of the necessary police measures enacted in all areas under the responsibility of the PSP (largest urban centers in the country) and other places that require a concerted and adequate police response, such as sanitary fences and/or violation of the obligation of confinement, in the cases provided for in the Law, which as such constitutes a crime of disobedience”. It is further specified that “[t]he handheld cameras may be used attached to unmanned aircraft

The PSP's request is made under Law No. 1/2005, of 10 January, amended and republished by Law No. 9/2012, of 23 February, which regulates the use of surveillance systems video by security forces and services in public places of common use, for capturing and recording image and sound and their subsequent processing, under which the use of mobile cameras is subject to authorization by the member of the Government responsible for the force or service applicant, preceded by an opinion from the CNPD. The request is also based on Decree of the President of the Republic no. presidential.

In these terms, the authorization request is temporarily limited to the duration of the state of emergency, and, as regards its territorial scope, it is only clarified that it is intended to use the video surveillance system in support of the operational activity carried out to ensure compliance with the provided for in the aforementioned Decrees, “namely in the sanitary fence of Ovar, in areas where there is usually a large concentration of people, access to road and rail terminals, places usually used for sports and pedestrian transit, parks and public gardens, under responsibility of the Public Security Police in national territory, ensuring a case-by-case assessment of the need and suitability of the technical means to be used-».

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In view of the generic and abstract nature of the authorization requested, it is also stated in the request that "[the] use of portable cameras by police elements must be communicated in advance to the National Directorate of the PSP, lacking [•■] prior authorization [from the Director National PSP] or the Deputy National Director/UOOS, which will be published on the PSP website».

The request is accompanied by two annexes with technical information on the equipment used. At the request of the CNPD, additional clarifications were sent regarding the technical characteristics of the equipment.

II. ASSESSMENT

1. Object of the CNPD opinion

Pursuant to Article 3(2) of Law No. 1/2005, of January 10, as amended by Law No. 9/2012, of February 23 (hereinafter, Law No. 1 /2005), the CNPD's opinion focuses on the compliance of the request with the rules regarding the security of the treatment of the collected data, as well as with the special security measures to be implemented, adequate to guarantee the entry controls at the premises, of the data carriers , insertion, use, access, transmission, introduction and transport.

Furthermore, under the terms of the same legal precept and also of paragraphs 4, 6 and 7 of article 7 of that law, the CNPD's opinion also focuses on respect for the prohibition of installing fixed cameras in areas that, despite located in public places, whether, by their nature, intended to be used in guarding or the use of video cameras when the capture of images and sounds involves the interior of the house or inhabited building or its dependence. The CNPD must also verify that the rights to information and access and elimination are ensured, with the exceptions provided for by law. Pursuant to paragraph 7 of article 3 of the same law, the CNPD may formulate recommendations with a view to ensuring the purposes set out in the law.

In other aspects of the processing of personal data carried out using a video surveillance system and not covered by Law no. of Law No. 59/2019, of August 8.

It is under these legal provisions that the CNPD issues this opinion.

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2. Use of portable video cameras that can be attached to unmanned aircraft during the state of emergency

2.1. The PSP authorization request, addressed to the Assistant Secretary of State and Internal Administration, for the use of portable cameras to capture images during the state of emergency presents some specificities in relation to the model legally provided for this type of authorization procedure. In fact, Law No. 1/2005 provides for and regulates the request for the concrete use of a video surveillance system in delimited territorial areas and for a determined period of time, thus understanding that the act covered by the request is an administrative act, in pursuant to article 148 of the Code of Administrative Procedure.

However, in the present case, the request is not territorially delimited (with the exception that will be analyzed below, in 2.3.) for the use by the PSP of a video surveillance system in any part of the national territory (which is subject to the jurisdiction of the PSP, as specified in the request) whenever, during the state of emergency, the use of such a system proves necessary to support the action of this security force. It is also intended that the concrete assessment of the need for its use be transferred to the National Director of the PSP (or to the Deputy National Director), appearing here to appeal to a subdelegation of the authorizing power of the Secretary of State (who only has competence by virtue of delegation of the respective Minister), in the top manager of that security force.

The abstract nature of the present authorization application is also revealed in the lack of precision on the number of portable cameras to be used (only the number of unmanned aircraft is indicated, in a set of 18) and in the lack of densification of the type of situations that could justify the use of mobile cameras. In fact, in order to justify the request, it is claimed that "[t]he adoption of police measures to use video surveillance, namely through the use of portable video cameras, recording images, in compliance with the principles of legality, proportionality, adequacy and necessity is of great importance in supporting the operational police activity that is going through, namely with regard to the safety of people and goods, as well as compliance with the rules issued by law», also invoking that the exercise of powers assigned by article 32 of Decree No. 2-A/2020 "adds a volume of places to be effectively monitored by the PSP". And specifically regarding the use of portable cameras attached to unmanned aircraft, it is alleged

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that «a visual control of the areas listed in the previous point is only possible, given the limitation of human resources, through the use of instruments that allow greater mobility and scope of capture». It is recalled, as mentioned above when describing the application, that the areas listed in the application are presented merely by way of example and in general terms.

In view of the foregoing, the CNPD believes that the request in question cannot be authorized in the broad terms in which it is presented, under penalty of being translated into a blank authorization to the National Directorate of the PSP to appeal anywhere in the national territory to a video surveillance system composed of portable video cameras in an unspecified number and 18 unmanned aircraft with video cameras, whenever the National Director deems their use appropriate and necessary to support the operational activity of the PSP within the framework of the execution of the Decree No. 2-A/2020.

This is not intended to devalue the consideration that the governing body of this security force makes regarding the specific situations in which the rights of citizens conflict with the public interest in the security of people and goods. Rather, it is intended to underline that, precisely because of the importance of such weighting and the consequences that it may have for citizens at any given moment, the legislator determined that this weighting serves as the basis for the authorization request, making it fall to the member of the Government responsible for the the area of internal administration the competence to specifically assess whether such consideration proves to be a fair and balanced solution for the different rights and interests at stake.

It is true that the exceptional situation in Portugal and in the world resulting from the pandemic caused by the new coronavirus SARS-CoV-2 and the Covid-19 disease, which justifies the partial suspension of the exercise of certain fundamental rights of citizens under the terms of the Decree of the President of the Republic No. 14-A/2020, can also specifically justify an expeditious action by PSP agents to guarantee the public safety and health interest, which involves the use of video surveillance through portable cameras and perhaps attached to aircraft unmanned. However, in this context, the PSP's action cannot fail to be guided by the terms in which the state of emergency was decreed, and the aforementioned Decree does not

allow for overcoming the legal distribution of powers between the member of the Government responsible for the area of internal administration and the leaders of the security forces.

Indeed, the aforementioned Presidential Decree determined, for a period of 15 days, the partial suspension of the exercise of the right to travel and settle in the national territory,

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specifying that "the necessary restrictions may be imposed by the competent public authorities to reduce the risk of contagion and implement measures to prevent and combat the epidemic, including compulsory confinement at home or in a health facility, the establishment of sanitary fences, as well as , to the extent strictly necessary and proportionately, the prohibition of travel and remaining on public roads that are not justified'. And, therefore, by legitimizing the adoption of the necessary restrictions to reduce the risk of contagion and implementing measures to prevent and combat the epidemic, the Presidential Decree admits that they are imposed only by the competent public authorities. In turn, Decree No. 2-A/2020, when defining, in articles 20 and 32, the intervention powers of the Minister of Internal Administration and the security forces, does not change the delimitation of competences defined in Law No. 1/2005. Thus, from a reading of the set of legal acts cited, the competence to determine restrictions on the right to travel and settle in the national territory rests with the Government and the member of the Government responsible for the area of internal administration, with the security forces being responsible for the operationalization of the restrictions defined in that plan.

It is insisted that the state of emergency decreed does not justify changing the legal distribution of powers between the member of the Government responsible for the area of internal administration and the security forces. On the contrary, it is precisely because the country is in a state of emergency and, therefore, some fundamental rights of citizens are being the object of a more restrictive police intervention, which cannot fail to ensure a close control of the activity of the security forces. by the responsible member of Government.

In this regard, we reiterate what was mentioned in the recent opinion of the CNPD regarding the use of unmanned aircraft for image capture by the Guarda Nacional Republicana¹. The use of portable cameras supported by remotely piloted aircraft, or

unmanned aircraft, to monitor and condition the movement of citizens increases the impact of video surveillance on people's private lives and on their freedom of movement. This is why prior control over the use of such resources has to be the object of consideration and concrete evaluation by those who have, in the Portuguese legal system, powers to do so. And these powers are only recognized, under the combined terms of Law No. 1/2005 and Decree of the President of the Republic No. 14-A/2020, when

1 Cf. Opinion 2020/32, of March 26, available at https://www.cnpd.pt/home/decisooes/Par/PAR_2020_32.pdf

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Minister of Internal Administration and, through his delegation, to the Assistant Secretary of State and Internal Administration.

In any case, it is always recalled that Article 6(2) of Law No. 1/2005 authorizes the National Director of the PSP to authorize the use of portable cameras whenever it is not possible to obtain the authorization of the responsible government body, in which case the procedure provided for therein must be followed with the consequences determined in paragraph 3 of the same article. But, as this legal regime does not consider or justify the use of video surveillance using unmanned aircraft, that legal rule does not have direct application to the use of cameras attached to aircraft.

2.2. Furthermore, in view of the gap in Law no. between the underlying interests of video surveillance with this scope and impact and the extent and intensity of the restriction of fundamental rights, only Presidential Decree No. video cameras and the control, in this way, of the movement and location of the people captured in the images.

And, in these terms, the CNPD does not question, in the exceptional situation experienced in Portugal, the suitability of using a video surveillance system supported by this type of equipment for the purposes of reducing the risk of contagion and guaranteeing the confinement of people.

However, given the broad and generic nature of the PSP's request in question, which does not specify the territorial areas subject to use of the system (with the exception that will be analyzed below, in 2.3.), it does not specify the number of mobile cameras and is limited to to base this use on a generalized need (considering the scarcity of human resources) for visual control of the areas under the responsibility of the PSP to support operational police activity, it is very difficult to conclude by the need for this use. Especially because, considering that the territorial areas under the responsibility of the PSP are areas of

high population density, it is particularly relevant to understand the exact areas targeted in the specific operations of the PSPs. In fact, the detailed elements that make it possible to understand the scope of the restriction of fundamental rights to freedom of relocation and respect for

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for private life; and without this it is difficult to assess whether there are less harmful measures (perhaps by limiting the technical equipment to be used) of those rights that allow the pursuit of the same purpose, with which it is not possible to conclude that this use is necessary.

In short, the broad and imprecise terms in which the authorization request is formulated do not allow an assessment of the need to use this video surveillance system with portable cameras possibly coupled to unmanned aircraft.

2.3. The only territorial delimitation indicated in the authorization request concerns the sanitary fence established in the municipality of Ovar. And as for that, even though the number of portable cameras to be used is not specified, nor the number of cameras attached to unmanned aircraft, the CNPD does not question the suitability and need for recourse to the video surveillance system by the PSP, in the territorial area. for which it is responsible, in conjunction with the GNR, within the scope of the respective authorization.

And it recognizes that, with the existence of a constitutional framework for restrictions on freedom of movement “necessary to reduce the risk of contagion and to implement measures to prevent and combat the epidemic”, also the restriction of privacy, in the strict dimension that is directly dependent on that freedom , is constitutionally framed. It is clarified that the right to respect for private life is affected by the possibility that, through the use of image capture, security forces are recognized to control the movement of people and, therefore, to know their location. It is also important to emphasize that the restriction of privacy is mitigated by the fact that the cameras attached to the aircraft are used at an altitude of 120 m (as stated in the request), thus reducing the possibility of capturing images of the interior of the houses and other buildings intended for use with reservation,

as well as the identifiability of citizens. The fact that none of the cameras capture sound, as stated, contributes to the same reduction in the impact on privacy.

In these terms, based on article 4 of the Decree of the President of the Republic No. 14-A/2020, of 18 March, and in Law No. CNPD considers that there is a legal framework for the use of portable cameras and video cameras attached to unmanned aircraft in the territorial area

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responsibility of the PSP of the municipality of Ovar, while the sanitary fence is established there.

2.4. Notwithstanding the conclusion reached in point 2.2., and understanding that the urgency of the operational activity of the PSP, in the context of the state of emergency, may not be compatible with the normal times of the authorization procedure, the CNPD does not exclude the possibility of , within the scope of this procedure, the limits and minimum conditions for the use of portable cameras and portable cameras supported by unmanned aircraft for the purpose of safety of people and property in the context of the objective of reducing the risk of contagion with the new coronavirus. The terms of this definition would not exempt, from the CNPD's perspective, the request for authorization for the specific use of this equipment, but would allow speeding up the process of analysis of the same by the member of the Government responsible for the area of internal administration, perhaps reporting only to the exact delimitation of the areas to be controlled and the concrete impact on people's privacy and freedom.

It is with this sense of searching for a solution that, in the current legal and constitutional framework, can be considered legitimate, that the CNPD then points out the main aspects to be taken into account in the processing of personal data associated with the use of this video surveillance system. as well as the main limits arising from the applicable legal regime, also presented here as a standard to be observed in future uses of the system in the current context of a state of emergency.

3. Main aspects of the image capture process and subsequent treatment

As mentioned above, in I., the application concerns the capture of images using handheld cameras and handheld cameras attached to unmanned aircraft.

Since the capture of images and their subsequent processing, even for the purposes it aims to satisfy, are likely to affect

identified or identifiable persons, this corresponds to a processing of personal data. To this extent, the capture, transmission, conservation and access to these data complies with the principle of proportionality, only justifying the restriction of fundamental rights, even those that were the subject of

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partial suspension by the Presidential Decree, to the strict extent necessary to achieve the purpose of reducing the risk of contagion and preventing and combating the epidemic.

Thus, the restriction of freedom of movement and privacy (in the strict dimension that is directly dependent on that freedom) that the use of video surveillance cameras, as an element of support for police action, promotes must be carefully delimited in the specific case, and must also be the rights of information, access and eventual deletion of the images, enshrined in article 35 of the Constitution of the Portuguese Republic and regulated in Law no. August.

3.1. In this regard, it should be noted that in the present application by the PSP it is stated that the rights of access and elimination are guaranteed, and that the terms provided for guaranteeing the right to information are also adequate. It is only added, since some models of unmanned aircraft are, as described in Annex II, equipped with a beacon system (light that identifies the presence of the aircraft), the convenience of its activation, to reinforce the dimension informative and also preventive in this specific context.

3.2. With regard to the protection of private life, it is important to ensure that the capture of images is done in a way that restricts the possibility of identifying the people captured in the images to the essential and, especially, safeguarding the privacy of those who are in their respective homes. In fact, the aforementioned Presidential Decree does not legitimize the restriction of the intimacy of private life and, therefore, of the sphere of privacy when people are confined to their homes. Thus, the capture of images should, if possible, avoid housing areas. When this is not possible, also in compliance with the provisions of paragraph 6 of article 7 of Law no. interior of dwellings and other buildings intended to be used with reserve, providing that, in these areas, the flight of aircraft takes place at a higher altitude. Therefore, the solution found by the PSP to

ensure that the capture of images takes place at 120m altitude is positive, especially in areas of high population density.

On the other hand, although, as a rule, the protection of privacy justifies, as established in Article 7(4) of Law No. 1/2005, the prohibition of capturing images of areas in public places which, by their nature, are intended to be used with protection, the exceptional situation of imposing social isolation and confinement allows

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legitimize the use of the video surveillance system in typically rest and social areas, such as parks and public gardens, to help prevent the concentration of people.

Still regarding the minimization of the impact on privacy, the capture of sound in the public space does not seem necessary for the purpose pursued with this request.

For this reason, it is noted as a positive fact that the present request states that there is no sound recording or recording (cf. point 5 of the request). However, the two types of portable cameras whose technical characteristics are indicated in Annex I are capable of capturing sound and it is only in the case of cameras attached to unmanned aircraft that it is stated that they do not capture sound (cf. Annex II). It was, however, declared, in the context of additional clarifications provided at the request of the CNPD, that "the cameras presented allow the sound recording functionality to be deactivated".

At the same time, it was also declared that the capacity for capturing thermal images that cameras attached to unmanned aircraft have (cf. Annex II) "will not be used, and it is also possible to disable this same capacity in the equipment". This "disabling" may prove to be relevant when considering the impact on privacy, since such a function, depending on its scope (which, however, is not specified in the annex), may allow the monitoring of the conduct of citizens inside buildings, possibly housing, and it is possible to identify people either by relationship with the images captured on the public road, or by relationship with the address.

3.3. In this sequence, the CNPD points out that, as the equipment in question (portable cameras and cameras attached to aircraft) correspond to models not specifically intended for professional use by security forces, and that are compatible with domestic or recreational use, they are as a rule devoid of security mechanisms that allow the auditability of the system. This aspect is particularly relevant in the context of data protection, since both the features described above (sound capture and

thermal images) are likely to be reactivated by the operator and the lack of records of such operations does not allow verification of compliance with the conditions set for the use of the video surveillance system.

The CNPD insists on this point: the guarantee of fundamental rights, in the context of the use of video surveillance systems, largely depends on the auditability of the

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system, in order to verify compliance with the limits and conditions that aim to safeguard those rights.

3.4. In relation to the transmission and recording of images, this request, like most requests of this nature, is essentially descriptive and generic, when a more demonstrative content would be demanded. This jeopardizes the assessment that the CNPD has to make regarding the security and auditability conditions of the system.

Thus, in point 4 of the application, it is clarified that the images are subject to encrypted transmission and that they are displayed in real time. More refers that the recording of the images is carried out in digital format, in an encrypted form. And although in annex II, when characterizing the equipment, reference is made to the system for recording images on an SD card, in the additional clarifications provided, it was stated that “there is no recording on an SD card”.

It is also specified that the place for viewing the images is the Strategic Command and Control Center (CCCE) of the Operations Department of the National Directorate of the PSP, in Lisbon, where the encrypted data is transferred «(using routers and encoders)’. Although it is not mentioned, it can be deduced from the other statements contained in the request that the recording of the images is carried out in the same Center. As for access to images, it is only mentioned that it is restricted to agents duly accredited for the purpose and that the actions carried out by them in the system are subject to registration.

The CNPD insists on the need to establish adequate security measures to guarantee the integrity and confidentiality of the data, which must, on the one hand, be described in a way to assess their suitability and, on the other hand, be implemented in terms that ensure system auditability. Only in this way, as has been highlighted, are there conditions for concrete considered decisions regarding the use of video surveillance systems, which safeguard the rights and interests at stake in this type of procedure. Without neglecting the power to monitor data processing in the context of video surveillance systems, as well as

the corresponding recommendation and corrective powers, held by the CNPD in the context of the application of Law No. 59/2019, of 8 August .

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III. CONCLUSION

1. Based on Article 4 of Decree of the President of the Republic No. 14-A/2020, of 18 March, and Law No. 1/2005, for the duration of the state of emergency, the CNPD considers that there is a legal framework for the use of portable cameras and video cameras attached to unmanned aircraft in the territorial area of responsibility of the PSP of the municipality of Ovar, while the sanitary fence is established there. And it understands that such a request is sufficiently detailed, from the outset in terms of the territorial scope, so that the suitability and necessity of using those equipments to assist police activity with the purpose of reducing the risk of contagion and guaranteeing the confinement of people can be recognized. .

2. Furthermore, the CNPD understands that the PSP's authorization request, in the broad and imprecise terms in which it is presented, not specifying in particular the specific areas of the national territory where the capture of images will be carried out, cannot be granted, under penalty of translating into a "blank authorization" to the National Directorate of the PSP to, during the state of emergency, resort to video surveillance anywhere in the national territory and using drones whenever the National Director deems it necessary.

It is precisely because the country is in a state of emergency, and some fundamental rights of citizens are being subject to more restrictive police intervention, that close control of the specific activity of the security forces must be ensured by the responsible member of the Government.

3. However, considering that, in the context of the state of emergency, the urgency of the PSP's operational activity may not be compatible with the normal times of the authorization procedure for the use of video surveillance systems, the hypothesis that, within the scope of the this procedure, the limits and minimum conditions for the use of portable cameras and portable cameras supported by unmanned aircraft for security purposes are defined

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of people and goods in the context of the objective of reducing the risk of contamination. The terms of that decision do not exempt, from the perspective of the CNPD, the request for authorization for the specific use of this equipment, but would allow accelerating the process of analysis of the same by the member of the Government responsible for the area of internal administration, by reporting only to the exact delimitation of areas to be controlled and consideration of the concrete impact on people's privacy and freedom.

4. The CNPD highlights in point II. 3. from its opinion the main aspects to be taken into account in the processing of personal data associated with the use of this video surveillance system in the current context of a state of emergency. And it recalls the essentiality, in order to protect the fundamental rights of citizens, of adopting measures capable of ensuring the auditability of the video surveillance system.

Lisbon, April 1, 2020

Filipa Calvão (President, who reported)

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