

National Data Protection Commission

OPINION/2023/58

I. Order

1. By order of the Secretary of State for Home Affairs, on March 21, 2023, a new opinion was requested from the National Data Protection Commission (CNPd) on the request for authorization to expand the video surveillance system in the city of Olhão, submitted by the Police of Public Security (PSP), pursuant to paragraph 3 of article 5 of Law No. 95/2021, of December 29, which regulates the use and access by security forces and services and by the National Authority from Emergency and Civil Protection to video surveillance systems for capturing, recording and processing image and sound.

2. The CNPD ruled on that request, within the scope of process PAR/2022/66, through OPINION/2022/102, of November 15, 2022, having then pointed out some inconsistencies and incompleteness regarding the information presented in the procedure, in particular with regard to the analytical data management system. There it was highlighted that the terms of use of that system, using artificial intelligence algorithms, were not sufficiently detailed.

1. In this regard, it is recalled what the CNPD stated in OPINION/2022/102:

«28. Now, the analytical criteria of the captured data - which the national legislator called "technical" - have significant relevance in assessing the proportionality of this specific operation of processing personal data, as they are likely to impact on citizens' rights, freedoms and guarantees. Therefore, they should be subject to a specific consideration of their adequacy and necessity in view of the purposes specifically aimed at with their use, by the person who defines them (the controller), as well as by the body that, in the context of a procedure authority, exercises the power to authorize the treatment and by the body with explicit advisory power in this matter (the CNPD).

29. With the CNPD issuing an opinion on the concrete application of the technology provided for in article 16 of Law no. the Government member with authorizing competence can assess the proportionality of the processing of personal data resulting from the use of the video surveillance system and, therefore, also from this specific processing operation, in accordance with the provisions of paragraphs 1 to 3 of article 4 of Law No. 95/2021, it would be, for this purpose, essential to identify and

explain (reasoning)

Accessible at <https://www.cnod.pt/decisoos/historico-de-decisoos/?year=2022&type=4&ent=>

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of the criteria that will guide the application of the functionalities described in Annex G. What does not happen.

32.[...The] safeguards made at the end of Annex G, of a merely declarative or intentional nature, are manifestly insufficient to ensure that the data analysis operation does not imply discrimination on the basis of constitutionally and legally prohibited factors, there being nothing in the description of the management system that demonstrates that such a risk is removed.»

2. Since the criteria with which this analysis would be implemented were not clear, the CNPD was therefore not able to verify "[...] respect for the conditions and legal and constitutional limits to its use, [...] [and] of the proportionality of such use".

Furthermore, it was not clear whether the processing of this analysis would be done by the chambers or by software installed on the server, nor what measures would be foreseen to prevent the alteration of the criteria used.

3. The CNPD also understood that it was essential to expressly and clearly specify, in a contract or agreement, the intervention of the Municipality of Olhão as a subcontractor regarding the processing of personal data resulting from the use of the system, as well as any sub-subcontractors

4. Following this opinion and under the required terms, the information contained in the new documentation attached is now appreciated, specifically the new "Annex G - Description of the criteria used in the "alarmistics" system and the model of the "Agreement for the Treatment of Personal Data in Subcontracting", here highlighting only the aspects of the treatment that are understood to still lack correction or completeness.

II. appreciation

i. Purpose of the opinion to be issued pursuant to article 5 of Law No. 95/2021, of December 29

5. Thus, pursuant to paragraph 3 of article 5 of Law No. 95/2021, of December 29 (hereinafter, Law No. 95/2021), the opinion of the CNPD, issued within the deadline set out in no. 4 of the same article (in conjunction with subparagraphs b) and c) of article 87 of the Code of Administrative Procedure), it is restricted to the pronouncement on the compliance of the request with the rules referring to the security of the treatment of collected data and with the provisions of paragraphs 4 to 6 of article 4 and articles 16, 18 to 20 and 22 of the same legal diploma.

5. In accordance with the provisions of these articles, the CNPD's opinion also includes respect for the prohibition of installing and using fixed or portable cameras in areas which, despite being located in public places, are, by their nature, intended to be used in seclusion and even the use of video cameras when the capture of images and sounds covers the interior of a house or building inhabited or its dependence or

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hotels and similar establishments, and when this capture affects, directly and immediately, the sphere of intimate and private life reservation.

7. The collection and subsequent processing of personal data is also the subject of an opinion by the CNPD, in particular when carried out through an analytical management system for the captured data, by application of technical criteria, as well as respect for the conditions and limits of conservation of the recordings.

8. The CNPD must also verify that all persons appearing in recordings obtained in accordance with said law are guaranteed the rights to information, access and elimination, with the exceptions provided for by law.

ii. Characterization of the analytical management system for the data processed in the video surveillance system

9. As stated in the documents now presented, the data analysis system works locally in the chambers (a total of 672), and all of them will be equipped with this capability. The "characterization of data collected by js]camerajs]" is stored on the video server, together with the recorded images. The person in charge indicates that a database of this characterization will not be created nor will this data be subject to treatment. This information is only used for identifying events, directing the operator to the camera that is capturing the occurrence, and can then be used to define the search criteria for the recorded images.

10. The person in charge states that analytics is a "fundamental tool in supporting the operation of CCTV systems, in particular when the operator has to control several systems with dozens of cameras". It is indicated that the Faro Command and Control Center will monitor three video surveillance systems: Faro, Olhão and Portimão.

11. The system integrated in the cameras can identify "objects" such as cars, trucks, bicycles, people in an upright position or people who have fallen. It has the ability, among others, to capture the shape and size of objects, their position, speed and trajectory.

12. These systems allow the creation of events that detect, for example, fallen people, stationary objects, standing or entering a certain area defined as "region of interest", objects crossing a virtual line in one or both directions, Violation of mandatory sense of motion and camera tampering such as sensor occlusion or extreme lighting. In some of the events, the systems allow counting the number of objects involved (e.g., number of people crossing a virtual line).

2 It is clarified in the new documentation submitted that the multisensor cameras only count as one device, aggregating the images of the 4 sensors into a single 360° panoramic image.

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13. Also according to what has been declared, the definition of these events is the sole responsibility of the "responsible for the treatment and conservation of data" and it is not possible for system operators to change the "standards created". "The logs that determine the signaling of the event are retained for a period of two years".

14. The person in charge further clarifies, taking into account the observations left by the CNPD in the previous opinion, that "the video surveillance system does not have the capacity to collect and process biometric data" and that it is not intended to capture and/or record audio .

iii. Impact of the processing of personal data through the analytical data management system

15. Faced with a video surveillance system in the city of Olhão, comprising a total of 67 cameras in operation, with real-time viewing by a limited number of operators, it is understandable the need for mechanisms that bring the focus to the cameras that, in real time, are capturing situations that threaten the protection of people, animals and property - one of the purposes behind the request for authorization to expand the system - in order to efficiently and effectively develop police activity.

16. Notwithstanding the use in this context of data analysis using artificial intelligence algorithms, it raises the potential risk of excessive affectation of privacy, as well as discrimination.

17. In fact, although the data analytics system does not systematically process biometric data for the unequivocal identification of the respective holder - the data analytics being "only" capable of generating alarms every time the camera detects an event consistent with the configured criteria such as, for example, a person fallen on a public road or the entry of an object in a pre-defined area -, the system is able to find patterns of behavior or action related to people who are identifiable.

18. To that extent, the operations carried out by the system correspond to personal data processing operations (cf. paragraphs 1) and 2) of article 4 of the RGPD), capable of significantly impacting people's private lives. First of all, the system is able to identify repetitive events that can reveal habits and routines of a specific or determinable person (because, remember, the cameras have enough definition to individualize a person or particularize a vehicle).

19. This is because this personal data is stored on the video server together with the recorded images, and can be used in research, which even allows the creation of a searchable base of events that observe a certain pattern. It is for this reason that the definition of these criteria, which the national legislator highlighted in Article 16(1) of Law No. 95/2021, is of paramount importance.

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20. Admittedly, it is stated in the annex accompanying the application that "[t]here is not created a database of this characterization of the data, nor is there an automatic treatment of these. The data characterization information is searchable in order to help the consultation of recorded images, in particular when it is necessary to detect specific events». Even so, the

configuration of analytical systems can lead to the collection of information that allows scrutinizing, for example, how many vehicles (e.g., car, bicycle) stop in front of a certain building (e.g., the home of a certain citizen) and where period do. Since this information is searchable, events of this nature are easily found in the database and associated with the video captures, which can then be consulted individually. The analytics system, which makes it possible to define events based on the type and size of the "object" (a specific citizen or vehicle) among other characteristics, provides the definition of alarms with such granularity that it can, in certain cases, make their "triggering" " so singular that it allows to highlight or single-out a specific "object" in a concrete situation, creating a searchable collection of video sequences that support the routine behavior of that "object".

21. Along with other information now presented and which allow clarifying aspects of the processing of personal data that were previously missing or inaccurate, the person in charge sought to develop the criteria of the image analysis system, under the heading «fundamentals for using the system [...]», a noteworthy effort that makes it possible to clarify the logic underlying the processing of personal data. Without questioning, in abstract, the proportionality of the criteria used, in the terms in which they are described, the CNPD remains concerned with the risks arising from the possible misuse or excessive use of this algorithmic system (or the data produced by it), recommending, for Therefore, special measures should be adopted to specifically safeguard the fundamental rights to privacy, non-discrimination and the protection of personal data.

22. Therefore, it is important to ensure that the set of criteria that can be configured corresponds to those exposed in the submitted documentation. In other words, the CNPD considers it essential that any alteration of this crucial aspect of the processing of personal data be subject to prior control by the competent member of the Government in this matter, supported by consultation with the CNPD (as required by article 5 specifically with regard to article 16 of Law No. 95/2021).

23. In any case, it is considered important that this configuration be done with shared responsibility, and the criteria used should always be known and previously validated by the hierarchy of the security force.

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24. It is also recommended that the camera configuration operations, where the alarm criteria and glare masks are defined, should be documented with allusion to the camera number, the name of the person responsible for the settings, the date and time, and, in the case of alarmfstica, a substantiated description of the criteria defined for the alarms and respective needs.

25. It is also recommended that the camera administration privileges, which allow the configuration changes described in the previous points, not be assigned to the operators who visualize/extract the images.

26. Finally, the CNPD recommends that the entire system be subject to regular audits, highlighting, in particular, the data analysis system, in order to assess the validity of the criteria configured in the clearinghouses, their compliance with the initial assumptions and their effectiveness for the purposes for which they are intended. Whenever those prove to be expendable, they must be promptly eliminated.

iv. The subcontracting agreement

27. Another aspect of the processing of personal data associated with the video surveillance system, which was particularly detailed in the review request now presented, concerns the subcontracting agreement to be signed between the controller - the territorially competent security force - and the Municipality of Olhão . Despite this densification, the draft agreement still has some shortcomings that are highlighted here.

28. The agreement involves three parties: the Municipality of Olhão, which corresponds to the first party, the security forces in terms of territorial competence, which corresponds to the second party and a third party, not specified, but who in paragraph 2 of clause 2.a is identified with the status of subcontractor.

29. Clauses 3.a to 5.a specify the obligations of each of the parties. But the analysis of the same does not express the capacity in which the Municipality of Olhão intervenes, not only because it is never identified as such (only as the first grantor), but also because of the obligations to which it is bound under the terms of clause 3. of the agreement do not comply with the tax set forth in Article 23(5) of Law No. 59/2019.

30. The CNPD once again insists that, under Law No. 95/2021, municipalities can only assume the role of subcontractors for the processing of personal data, since the person responsible is the territorially competent security force. And as a

subcontractor, a municipality is bound by the set of obligations set out in article 23 of Law No. 59/2019, and these obligations must be made explicit in the subcontracting agreement.

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31. To that extent, the obligations contained in clause 5.a actually fall primarily on the Municipality of Olhão, as the initial subcontractor, in the legal relationship with the controller. The successive or new subcontracting of a company (a second subcontracting or subcontracting) is admissible under the terms of paragraph 2 of article 23 of Law no. 59/2019, but does not release the Municipality of Olhão from its obligations before the security force. Incidentally, the eventual non-compliance with the obligations in terms of protection of personal data, by the second subcontractor, makes the first subcontractor liable before the security force.

32. In any case, as established in Article 23(5) of Law No. 59/2019, the obligations set forth therein regarding the first subcontractor, the Municipality of Olhão, must be specified in the agreement. As well as the obligation provided for in clause 8 of the agreement, in accordance with the provisions of paragraph 7 of article 32 of the same law.

33. Thus, the CNPD recommends specifying in the agreement, in clause 2.a (or another), the status of subcontractor of the Municipality of Olhão, without prejudice to a company appearing as a successive or second processing subcontractor, and that expressly the Municipality is bound, in clause 3.a (or another), to the obligations listed in paragraph 5 of article 23 and in paragraph 7 of article 32 of Law no. 59/2019, under penalty of of illegality of the agreement to be concluded.

III. Conclusion

34. As it is not within its legally assigned competence to pronounce on the concrete grounds for expanding the video surveillance system in the city of Olhão and the use of an analytical image management system, but the CNPD remains concerned with the risks arising the possible misuse or excessive use of this algorithmic system (or the data produced by it), with the arguments set out above and under the competence conferred by Law No. 95/2021, the CNPD recommends:

The. The adoption of specific appropriate measures to specifically safeguard the fundamental rights to privacy, non-discrimination and the protection of personal data and, in particular, respect for legal and constitutional limits on the use of

that system, suggesting for this purpose the indicated above in points 22 to 26;

B. The specification in the subcontracting agreement of the status of subcontractor of the Municipality of Olhão, without prejudice to a company appearing as the successive or second subcontractor of the treatment, and that the Municipality of Olhão is expressly bound therein to the obligations listed in paragraph 5 of article 23 .º and no. 7 of article 32 of Law no. 59/2019, under penalty of illegality of the agreement to be concluded.

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Approved at the meeting of June 16, 2023

Paula Meira Lourenço (President)