Deliberation 2019-123 of October 3, 2019Commission Nationale de l'Informatique et des LibertésNature of the deliberation: OpinionLegal status: In force Date of publication on Légifrance: Tuesday February 25, 2020NOR: CNIX2005404XDeliberation n° 2019-123 of October 3, 2019 providing an opinion on a draft decree creating an automated processing of personal data called "mobile note-taking application" (GendNotes) (request for opinion no. 17021804)The National Commission for Computing and Liberties,

Seizure by the Minister of the Interior of a request for an opinion relating to a draft decree creating an automated processing of personal data called a mobile application for taking notes (GendNotes);

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 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention and detection of crime criminal proceedings, investigation and prosecution in this area 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 Code of Criminal Procedure, in particular its Articles 75-1 and 495-21;

Having regard to the internal security code, in particular its article L. 235-1;

Considering the law n° 78-17 of January 6, 1978 modified relating to data processing, files and freedoms, in particular its articles 31-II and 89-II;

Having regard to decree n° 2011-111 of January 27, 2011 authorizing the implementation by the Ministry of the Interior (General Directorate of the National Gendarmerie) of an automated processing of personal data to assist in the drafting of procedures (LRPGN);

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

Considering the deliberation n° 2010-119 of May 6, 2010 providing an opinion on a draft decree in Council of State creating a processing of personal data relating to assistance in the drafting of procedures and writings called ICARE ;

After having heard Mrs. Sophie LAMBREMON, commissioner, in her report and Mrs. Nacima BELKACEM, government commissioner, in her observations,

Gives the following opinion:

The commission received a request from the Minister of the Interior for an opinion on a draft decree creating an automated processing of personal data called a mobile application for taking notes (GendNotes).

It notes that the planned processing aims to dematerialize the taking of notes by the soldiers of the National Gendarmerie during their interventions with a view in particular to feeding in an automated way the business application Software for Writing Procedures of the National Gendarmerie called LRPGN (ex -ICARE) and to allow the transmission of reports directly by electronic means to the magistrate of the territorially competent public prosecutor's office.

The commission observes that the GendNotes processing, by querying other processing of personal data and transmitting information to the competent public prosecutor, is implemented within the framework of the interventions and investigations carried out by the soldiers of the national gendarmerie, in particular for the purposes of prevention, investigation and prosecution of criminal offenses or the execution of criminal penalties, including protection against threats to public security. It considers that it therefore falls within the scope of the aforementioned directive (EU) 2016/680 of April 27, 2016 and that it must be examined in the light of the provisions of articles 87 and following of the law of January 6, 1978. modified.

Insofar as the planned processing is likely to relate to data mentioned in I of Article 6 of this same law, it must be the subject of a decree in Council of State, taken after reasoned and published opinion of the commission, in accordance with articles 31-II and 89-II of the law of 6 January 1978 as amended.

In any case, the commission recalls that it must be kept informed and seized, under the conditions provided for by article 33-II of the law of January 6, 1978 as amended, of the modifications made to this processing. In the same way, it recalls that the impact analysis relating to data protection (AIPD) transmitted to the commission, under the conditions provided for by article 90 of the aforementioned law, must be subject to an update. up to date.

On the purpose of the processing:

Article 1 of the draft decree specifies that the purpose of the planned processing is to allow the dematerialization of note-taking by the soldiers of the national gendarmerie, on the one hand, and to pre-fill in other processing used by the soldiers of the national gendarmerie by personal data and information entered when writing a note, on the other hand.

The commission notes first of all that the GendNotes processing must make it possible to facilitate the work in mobility of the soldiers of the national gendarmerie by allowing the dematerialization of their note taking, which does not call for particular

observations.

With regard to the pre-information of other processing used by the soldiers of the National Gendarmerie, the commission notes that the GendNotes processing will be interconnected with the LRPGN, which it will make it possible to feed automatically, and that it will also be linked to the mobile application called Messagerie Tactique. It notes that this application is an interface making it easier to query several files from a single entry of data relating to the civil status of the person concerned. In this respect, this interface must make it possible to query the File of Wanted Persons (FPR), the National Driver's License System (SNPC), the Application for Managing the Files of Foreign Nationals in France (AGDREF), and the Processing a criminal record (TAJ) in the context of the tort fixed fine procedure.

The commission also notes that the supply of the Tactical Messaging will only concern the civil status data of the person concerned and that the responses to the interrogation of these files will be made separately, by independent messages.

Without calling into question the legitimacy of the questioning of these different processing operations with regard to the clarifications provided by the Ministry, the commission considers that this purpose should be further specified in the draft decree in order to explicitly mention the processing operations that can be linked or being the subject of interconnections with the GendNotes processing, since these connections constitute, in themselves, one of the purposes assigned to the GendNotes processing.

The commission recalls that the various processing mentioned above must, if necessary, be modified in order to expressly provide for interconnections or links with the GendNotes processing.

On the data collected:

Article 2 of the draft decree provides that may be recorded in the processing of data and information concerning all elements relating to persons, places or objects collected within the framework of the interventions of the soldiers of the national gendarmerie or the execution of their service as well as all the procedural elements transmitted to the magistrates during police custody or during the processing of certain offenses relating to the traffic police. The categories of data collected are defined in the appendix to the draft decree.

As a preliminary point, the commission notes that data and information relating to objects may be recorded in the processing. In this respect, data relating to the civil status of the owner or holder as well as the serial number, registration or other identification number are likely to be collected, in order to allow precise identification of the object concerned.

With regard to mobile phones, the committee notes that the recording of the PIN code or the PUK code may be carried out within the framework of investigations in order to unlock the device.

The collection of this data relating to the objects does not call for any specific comments from the committee.

Article 2 of the draft decree also allows the collection of the following data:

- data and information relating to natural persons;

- data relating to messages of placement in police custody intended for a magistrate;

- data relating to traffic police offenses intended for public prosecutors. In general, the commission notes that the GendNotes application allows personnel with access to processing to fill in free fields. It recalls that the data processed must be relevant, adequate and not excessive with regard to the purpose pursued. While the commission takes note of the ministry's commitment to pre-fill these free fields with specific information relating to the way in which they should be filled in, it recalls that strict control must be ensured in this regard.

The commission also notes that sensitive data mentioned in I of article 6 of the amended law of 6 January 1978 may be collected. It takes note of the clarifications provided that these data, which will be collected according to the circumstances of the intervention as well as the nature of the facts with which the member of the national gendarmerie user is confronted, relate to data relating to the alleged racial or ethnic origin. , political opinions, religious and/or philosophical beliefs, trade union membership, health, sex life or sexual orientation.

Although the commission notes that it will be prohibited to select a particular category of people on the basis of this information alone, it emphasizes that, in accordance with article 88 of the law of 6 January 1978 as amended, the processing of such data is not possible only in cases of absolute necessity, subject to appropriate safeguards for the rights and freedoms of the data subject. On this point, the commission takes note of the guarantees provided by the ministry, namely that the information recorded in these free fields will not be able to supply other processing and that they will only be accessible via the application.

The committee also observes that the appendix which lists the personal data and information recorded in the processing does not mention the category of data relating to sensitive data. While it takes note of the ministry's commitment to supplement article 2 of the draft decree in order to specify the exact scope of the sensitive data concerned, it recommends that the appendix also be supplemented on this point.

In the first place, may be recorded in the processing of data and information relating to natural persons. As such, the

commission notes that the photograph of the person may be collected. The commission takes note of the details provided by the ministry according to which the photographs will be taken with the tablet or the smartphone used by the gendarme and will then be stored on the terminal or on the SD card of the telephone. It also notes that no facial recognition device will be implemented from the photograph and considers that this guarantee could usefully be included in the draft decree.

Secondly, can be recorded in the processing of data relating to the message of placement in police custody intended for a magistrate. The committee takes note of the clarifications provided that these data must make it possible to ensure precise monitoring of the legal proceedings. It notes that only the following data may be collected: the investigation unit, identity data of the judicial police officer responsible for police custody, the magistrate informed, the lawyer as well as the person of the family informed, the date and place of placement in police custody, the framework of the investigation, the procedure number, the list of offenses which motivated the custody and the notification of rights (rights relating to the request for a lawyer, at the request of a doctor, at the information of the family, at the information of the employer).

Thirdly, data relating to traffic police offenses intended for public prosecutors can be collected and recorded in the processing, namely: the date of summons, the income of the person in question and information specific to the driver's licence, driving without insurance and driving under the influence of alcohol.

Concerning the collection of data relating to the income of the person in question, the committee notes that, with regard to the procedure for a fixed fine for certain offences, article 495-21 of the code of criminal procedure allows the court, by derogation and on an exceptional basis, by decision specially reasoned with regard to the expenses and income of the person, not to pronounce a fine or to pronounce a fine of an amount lower than those provided for.

The commission wonders however, with regard to the data collected concerning the message of placement in police custody intended for a magistrate, on the absence, in the category of data relating to traffic police offenses at destination prosecutors (IV of the draft appendix), the collection of data relating to the unit concerned by the investigation, the identity of the judicial police officer responsible for the procedure and that of the magistrate of the public prosecutor's office informed and of the type of offense concerned. It considers that if this information is intended to be provided in the note and transmitted to the magistrates of the public prosecutor's office, the draft decree should be amended in order to mention it expressly.

Fourthly, the commission notes that data relating to the geolocation of the user of the processing may be collected, in the event that the geolocation parameters are activated. In this regard, the commission takes note of the clarifications provided by

the ministry according to which the user of GendNotes is left with a choice between two options, which can be combined:

- either the user manually enters the location of the intervention (address and municipality) in the note;

- either the user uses the GPS data of the mobile equipment by activating this functionality in order to enter his location in the note. The commission considers that, since the location data constitutes personal data, the draft decree should be modified in order to mention the possible collection of geolocation data of the user of the application, in accordance with article 35-3° of the law of January 6, 1978 as amended. It takes note of the ministry's commitment to complete the draft decree in this regard.

29. Subject to these reservations, the committee considers that the collection of the categories of data provided for in Article 2 of the draft decree appears justified and proportionate.

On the data retention period:

Article 3 of the draft decree provides in particular that the data recorded in the processing are kept for a period of three months from the date of their recording and that in the event of modification within this period, the storage period is extended. three months from the date of the last modification. The maximum retention period may not exceed one year.

The commission takes note of the clarifications provided by the ministry according to which the modification of the content of a note can only occur in the following three cases:

- when the same person is concerned by several successive interventions;

- when the note is updated or supported with regard to the elements obtained or by the results of the operations carried out;

- when Gendarmerie personnel with access to the processing correct or complete the notes after proofreading, which may take place at a later date than that of the creation of the note. It also takes note that any modification of one of the elements of the note systematically leads to a postponement of the retention period by three months, within the limit of one year, the ministry having specified that this retention period makes it possible to adapt:

- the time taken to carry out the surveys, which may vary, and to take account of periods of absence of personnel;

- the delays sometimes necessary to gather certain elements allowing to judge the advisability of opening a procedure;

- the processing time for procedures in the units, which is on average four months, and during which certain information can be checked or taken over. In addition, the committee notes that the notes are not automatically deleted when their content is transferred to LRPGN processing. These are indeed automatically deleted, by default, only at the end of the fixed retention period, which can range from three months to one year in the event of successive modifications. It notes that the user will

retain the possibility, at any time, to delete the note that he has created by a manual action.

The Committee notes that it is clear from article 75-1 of the Code of Criminal Procedure that, when instructing judicial police officers to carry out a preliminary investigation, the public prosecutor sets the time limit within which this investigation must be carried out and may extend it. This same provision provides that in the case where the investigation is carried out ex officio, the judicial police officers report to the public prosecutor on its state of progress when it has been started for more than six months.

While the committee takes note of the clarifications provided by the ministry that some of the information contained in the planned processing may be useful, including after the closure of an investigation, it recommends that, in principle, the data be deleted as soon as the time limit expires. , possibly extended, set by the public prosecutor when this is different from the retention period initially determined, or when the investigation is completed and there is no longer any need to keep them, without waiting for the automatic deletion of the data at the end of the maximum retention period of one year of the data.

Under these conditions, the commission considers that the data are kept for a period not exceeding that necessary with regard to the purposes for which they are processed, in accordance with article 4-5° of the law of January 6, 1978 as amended.

On the recipients of the data:

Article 4 of the draft decree lists the accessors and recipients to all or part of the data and information recorded in the processing by reason of their attributions and within the limit of the need to know.

As a preliminary point, the committee notes that the impact analysis transmitted lists a list of the data accessible for each category of recipients.

Firstly, article 4 of the draft decree provides for access to all or part of the data and information recorded in the processing, on the basis of their attributions and within the limit of the need to know:- the military the National Gendarmerie who drafted the note and the other National Gendarmerie soldiers assigned to his unit, unless he objects. In this case, only the soldiers individually designated by the writer of the note assigned to his unit can access it;

- National Gendarmerie soldiers from another unit individually designated by the writer of the note. Given the purposes assigned to GendNotes processing, access to the processing provided for these people does not call for any particular comments of the commission.Secondly, this same article also provides that the recipients of all or part of the data and information recorded in the processing, by reason of their attributions and within the limit of the need to know:

- judicial authorities;

- the administrative authorities, namely the prefect and sub-prefect with territorial jurisdiction, the mayor of the municipality concerned as well as the High Commissioner of the Republic in New Caledonia and French Polynesia. In general, the commission considers that the transmission to the aforementioned recipients of data recorded in the processing cannot result in extending the scope of the information of which they are likely to become aware by means of their access to other processing. It therefore draws the Ministry's attention to the need to strictly control the allocations and the need to know about these recipients in application of the legal provisions in force.

In addition, the commission notes that the judicial authorities referred to in the draft decree are the territorially competent public prosecutor and the other magistrates of his public prosecutor's office and that they can only be recipients of the categories of data relating to the message of placement in police custody and data relating to traffic police offences.

The commission also notes that the transmission of the information recorded in the processing to the administrative authorities, provided for by the draft decree, may concern all the information recorded in the processing within the limit, where applicable, of their powers and of the need to know about it. However, the department has indicated that the transmission of this information will not be done via the GendNotes application, due to the lack of functionality in the application allowing it. Information recorded in the processing may thus be transmitted outside the framework of the application, the ministry having specified that this transmission may be done orally, by email or in writing.

In this respect, the committee considers that, in the absence of functionality allowing the transmission of information in the application, such transmission can only be carried out outside of the said application if sufficient measures guarantee the confidentiality and security of the data. transmitted. Given the sensitivity of this data, it would be appropriate for it to be transmitted in encrypted form and for these transmissions to be traced.

Furthermore, the commission notes that, if data may be transmitted outside the European Union, these transfers will not be automated and can only be carried out within the framework of international cooperation in the field of judicial police and to the services of foreign police, in accordance with article L. 235-1 of the internal security code. They will be subject to the secrecy of investigations according to the procedures provided for in the framework of international criminal assistance. While the commission also notes that data may thus be transferred to international cooperation bodies in the field of judicial police, it regrets that the ministry has not detailed the list of these bodies.

The commission recalls that transfers of data to States that do not belong to the European Union or to recipients established in States that do not belong to the European Union may only be carried out subject to compliance with the conditions set out in article 112 of the modified law of January 6, 1978. Where appropriate, appropriate safeguards for the protection of personal data should in particular be provided by a legally binding instrument. In the absence of an adequacy decision adopted by the European Commission or of appropriate guarantees, and by way of derogation from the aforementioned article 112, such transfers can then only be carried out subject to compliance with the conditions set out in article 113. of the aforementioned law of January 6, 1978.

These elements recalled, the commission considers that the consultation of the data by the persons mentioned in article 4-II of the draft decree appears justified and proportionate.

On human rights:

Firstly, article 5 of the draft decree provides that the right of opposition provided for in article 110 of the amended law of 6 January 1978 does not apply to the planned processing.

The committee notes in this respect that this article 110 provides for the possibility of disregarding the right of opposition when the processing meets a legal obligation or when an express provision of the regulatory act authorizing the processing excludes it.

In the present case, the commission considers that the exclusion of the right to object as provided for in article 5 of the draft decree is strictly proportionate with regard to the purposes pursued by the planned processing, namely the dematerialization of the taking of notes by the soldiers of the national gendarmerie, on the one hand, and the pre-intelligence of other applications used by the soldiers of the national gendarmerie by personal data and information entered when writing a note, d 'somewhere else. In view of the foregoing, it considers that the limitation placed on the exercise of the right of opposition is not such as to infringe excessively on the rights and freedoms of the persons concerned.

Secondly, this same article specifies that, in accordance with articles 104 to 106 of the law of January 6, 1978 as amended, the rights to information, access, rectification, deletion and the limitation of data are exercised to the General Directorate of the National Gendarmerie.

In this respect, the GendNotes processing being able to record data relating to minors, the commission recalls that, according to recital 39 of the aforementioned directive 2016/680 of 27 April 2016, in order to allow the persons concerned to exercise

their rights, any information communicated to them should be easily accessible, including on the controller's website, and easy to understand, and expressed in clear and simple terms. This information should be tailored to the needs of vulnerable people such as children.

Article 5 of the draft decree also indicates that these rights may be subject to restrictions in order to avoid hampering investigations, research or administrative or judicial proceedings or to avoid harming the prevention or detection criminal offenses, investigations or prosecutions in this area or the execution of criminal sanctions, to undermine public security or national security in accordance with 2° and 3° of II and III of Article 107 of the amended law of January 6, 1978.

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 observations.

On data security and traceability of actions:

Firstly, concerning the procedures for authenticating individuals, the commission notes that the password policy provided for by the ministry does not comply with its deliberation no. 2017-012 of 19 January 2017 adopting a recommendation relating to passwords, in that it does not provide for locking access to the individual account after multiple incorrect entries of passwords. The commission therefore invites the ministry to review its policy in order to comply with its doctrine and reliably authenticate processing users.

Secondly, with regard to the security measures applied to mobile terminals and to the removable storage media of these same terminals, the committee takes note of the fact that a remote locking function has been implemented in order to allow the blocking of the terminal in case of loss or theft. It nevertheless notes that, on the one hand, the proper functioning of this functionality requires that the terminal have access to a communication network, which will not necessarily be the case in the event of theft, and that, on the other hand, this feature does not work on removable storage media.

Generally speaking, the commission strongly regrets that the ministry has not provided for encryption measures for terminals as well as storage media; this type of security measure, which is becoming more and more common and easy to implement, appears to be the only reliable way to guarantee the confidentiality of data stored on mobile equipment in the event of loss or theft.

Thirdly, concerning the updates of the software used on the mobile terminals, the ministry informed the commission that the updates would be managed internally at the ministry, and that the local IT services would be informed of the availability of

these updates so that they inform their users, who must launch the updates themselves.

The committee considers that, given the risks in the event of the persistence of security flaws on mobile terminals, the ministry should adopt a more proactive approach in the distribution of updates, and reserve the possibility of imposing the application of an update to users when the risks justify it.

Fourthly, concerning the exchange of data relating to police custody, the ministry indicates that this data will be exchanged by e-mail in clear via an inter-administration network shared with the ministry of justice. Given the sensitivity of this data, the committee considers that it should be transmitted in encrypted form.

Fifthly, concerning logging measures, the ministry indicates that the notes will be subject to traceability measures including creation and deletion operations. Modification operations will not be traced. Furthermore, part of the trace management is delegated to the LRPGN application. Finally, the Ministry indicates that it will keep the traces for a period of six years corresponding to the limitation period for public action in tort.

The committee considers that modification and consultation operations should also be subject to traceability measures, and it questions the relevance of the retention period envisaged by the ministry. Indeed, this being longer than the retention period of the data in the processing, any consultations outside the legal framework cannot be continued once the processing data has been deleted, the traceability data becoming useless once the processing data has been deleted. .

Sixthly, concerning the impact analysis on data protection carried out by the ministry, the committee recalls that this aims to assess the risks weighing on the persons concerned, and not on the activity of the data controller. . As such, the security objectives must therefore be based on the consequences for the persons concerned by the processing.

The commission notes that the development and production environments are separate, and that the development of software is carried out on fictitious data.

The other security measures do not call for any particular comments from the commission.

The president,

M. L. Denis