

Third additional opinion of the National Commission for the data protection relating to bill n°7498 amending of the amended law of 18 July 2018 on the Grand Ducal Police.

Deliberation n°16/AV12/2021 of April 28, 2021

In accordance with article 46, paragraph 1, letter (c) of directive (EU) n° 2016/680 of 27 April 2016 on the protection of individuals with regard to the processing of personal data personal character by the competent authorities for the purpose of crime prevention criminal proceedings, investigation and prosecution thereof or the execution of criminal penalties, and free movement of such data, and repealing Council Framework Decision 2008/977/JHA (hereinafter referred to as “the directive”), to which article 8 of the law of 1 August 2018 on organization of the National Commission for Data Protection and the general regime on data protection (hereinafter the "Law of 1 August 2018 on the organization of the National Commission for Data Protection and the general data protection regime Data"), the National Commission for Data Protection (hereinafter the "Commission Nationale" or the "CNPDP"), “advises the Chamber of Deputies, the Government and other institutions and bodies on legislative and administrative measures relating to the protection of the rights and freedoms of natural persons with regard to data processing personal”.

On February 28, 2020, the CNPD notified draft law no. 7498 amending the amended law of 18 July 2018 on the Grand Ducal Police (hereinafter the “draft law”)1.

On April 17, 2020, the National Commission issued its additional opinion on the government amendment to the bill2, approved by the Government Council in its meeting of March 20, 2020.

On March 3, 2021, the National Commission issued its second additional opinion following the amendments relating to the draft law3, adopted by the Safety Committee Interior and Defense adopted on November 19, 2020.

On March 29, 2021, the Committee on Homeland Security and Defense adopted a series

of amendments relating to the bill (hereinafter the “amendments”).

1 Opinion of the National Commission for Data Protection relating to bill no. 7498 amending the amended law of 18 July 2018 on the Grand Ducal Police, deliberation n°04/2020 of 28 February 2020.

2 Complementary opinion of the National Commission for Data Protection relating to draft law no. 7498 amending of the amended law of 18 July 2018 on the Grand Ducal Police, deliberation n°10/2020 of 17 April 2020.

3 Second additional opinion of the National Commission for Data Protection relating to draft law No. 7498 on modification of the amended law of 18 July 2018 on the Grand Ducal Police, deliberation n°8/AV7/2021 of 3 March 2021.

Insofar as the amendments concern provisions which have been commented on by the

CNPD in its above-mentioned opinions of February 28, April 17, 2020 and March 3, 2021, the latter takes its own action to notify them.

- Ad Amendment 1

The purpose of Amendment 1 is to modify paragraph (3) of the new article 43bis of the law amended on July 18, 2018 on the Grand Ducal Police.

It is regrettable that the remarks of the CNPD were not taken into consideration by

the authors of the bill with regard to its observations raised in its opinion of 3

March 2021, namely that “the bill under consideration currently provides that only the director

General of the Grand Ducal Police may take the initiative, with the authorization of the Minister, to

extend the VISUPOL video surveillance system to other municipal territories than that of

Luxembourg City. In the event that the said system is extended to other territories

councils, shouldn't a system be provided for that would not be based solely on the initiative

of the Director General of the Grand Ducal Police? »4.

The National Commission reiterates such considerations.

- Ad Amendment 3

The purpose of this amendment is to modify paragraph (11) of the new article 43bis of the law

amended on July 18, 2018 on the Grand Ducal Police.

This amendment introduces new provisions which set the retention period for images from the video surveillance system and processed for the purposes of “analysis of the progress intervention and internal training” for a period “maximum of ten years”.

The purpose of this amendment is also to introduce a second paragraph in paragraph (11) of the aforementioned article. The added provisions state that “[i]f the images used for the analysis of the course of the intervention and the internal training make it possible to directly identify a data subject, irreversible masking techniques must be used for the purposes of anonymization.

These new provisions raise the following observations from the CNPD.

- On the notion of personal data

As regards the provisions relating to irreversible masking techniques, the authors of the bill specify, on this subject, that "in the specific context of sequences of images, “directly identifiable” should be understood to mean any person who can be identified directly and unequivocally by reference to one or more specific elements

4 Deliberation n°8/AV7/2021 of 3 March 2021, point 2 “On the advice of the Union of Luxembourg towns and municipalities”, page 5.

specific to his physical identity, while the other identifiers provided for by the definition of "personal data" in the law of 1 August 2018 on the protection of natural persons with regard to the processing of personal data in criminal as well as national security do not apply to the images”.

However, it should be recalled that Article 2, paragraph (1), point 1°, of the law of 1 August 2018 on the protection of individuals with regard to the processing of personal data personnel in criminal matters as well as in matters of national security, defines the notion of “personal data as” any information relating to a person identified or identifiable natural person (hereinafter referred to as “data subject”); is deemed to be an “identifiable natural person” a natural person who can be identified,

directly or indirectly, in particular by reference to an identifier, such as a name, a number identification, location data, an online identifier, or to one or more elements specific to his physical, physiological, genetic, psychic, economic identity, cultural or social” (underlined in the text by the CNPD).

In the context of video surveillance, it should be noted that such a system is likely to cause the collection of pictorial information of people entering the monitored space which are identifiable on the basis of their appearance or other specific elements<sup>5</sup>. Such information is to be qualified as personal data because it makes it possible to identify directly or indirectly from people entering the monitored area.

Therefore, an image from a video surveillance system which would contain elements allowing the direct or indirect identification of a natural person should be considered as personal data.

The fact that the persons concerned can be identified directly or indirectly does not have no impact on the fact that the information which makes it possible to identify them is to be qualified as personal data. As well as the elements indicated in the definition referred to said Article 2, paragraph (1), point 1°, and listed after “in particular” are listed as non-exhaustive examples, the adverb “in particular” being, here, of an indicative nature.

On the basis of their comments, the authors of the bill therefore seem to be carrying out a misinterpretation of the concept of personal data. The text under notice should then be amended, so as to reflect the definition as provided for in Article 2, paragraph (1), point 1°, of the law of 1 August 2018 on the protection of natural persons with regard to the processing of personal data in criminal matters as well as in security matters national.

<sup>5</sup> See Guidelines 3/2019 on the processing of personal data by video devices, adopted on 29 January 2020 by the European Data Protection Board, point 2.1. “Personal data”, page 6.

- On the notions of pseudonymization and anonymization

The authors of the bill intend to provide that irreversible masking techniques will be used for anonymization purposes. However, according to the commentary of the authors of the bill, the National Commission understands that these techniques would not allow a anonymization of personal data because said techniques would only target the “anonymization” of information that would directly identify a person concerned.

However, it is necessary to draw the attention of the authors of the bill to the fact that anonymization should not not be confused with pseudonymization.

With regard to anonymization, although this concept is not defined by the law of August 1 2018 on the protection of natural persons with regard to the processing of personal data personal character in criminal matters as well as in matters of national security, it is necessary to note that recital 21 of Directive (EU) 2016/680 of the European Parliament and of the Council, on the protection of individuals with regard to the processing of personal data personnel by the competent authorities for the purposes of prevention and detection of infringements criminal proceedings, investigation and prosecution thereof or the execution of criminal penalties, and free movement of such data, and repealing Council Framework Decision 2008/977/JHA, sets out that “[t]here is (...) no need to apply the principles relating to data protection to anonymous information, i.e. information that does not relate to a natural person identified or identifiable, nor to personal data rendered anonymous in such way that the person concerned is not or no longer identifiable. ”.

Anonymization is therefore a processing operation that consists of using a set of in such a way as to render impossible, in practice, any identification of the person by any means whatsoever and irreversibly.

With regard to pseudonymisation, Article 2, paragraph (2), point 5°, of the law of 1 August 2018 mentioned above provides that it consists of a “processing of personal data of such that they can no longer be assigned to a specific data subject without

have recourse to additional information, insofar as this

information

additional data are kept separately and subject to technical and

organizational to ensure that personal data is not attributed

to an identified or identifiable natural person". Pseudonymization thus makes it possible to process

the data of individuals without being able to identify them directly. The data concerned

therefore retain a personal character.

Therefore, if the intention was to anonymize personal data from a system

video surveillance, then irreversible masking techniques will have to apply to all

information that directly or indirectly identifies a person

concerned. On the other hand, if only the information making it possible to directly identify a

person concerned are subject to said techniques, then this process will be qualified as

pseudonymization. Indeed, in such a case, it will still be possible to indirectly identify the

persons concerned.

In addition, the authors of the draft law should be aware that if the data

were to be anonymized then the rules of data protection will not be intended to

apply. This means that the principle of retention limitation should not be

respected and that a retention period should therefore not be included in the draft law under

notice.

The CNPD therefore considers it necessary for the authors of the bill to clarify these provisions.

and use the appropriate concepts from a data protection point of view. As such, the

National Commission suggests that the authors of the bill draw inspiration from the Belgian provisions,

in that they provide that after anonymization, "the information and data of a

personnel collected by means of cameras »6 « can be used for didactic purposes and

pedagogical as part of the training of members of the police services"7.

Thus decided in Belvaux on April 28, 2021.

The National Data Protection Commission

Tine A. Larsen

President

Christopher Buschman

Marc Lemmer

Commissioner

Thierry Lallemand

Commissioner

Commissioner

6 Article 25/6 of the amended law on the police function of August 5, 1992

7 Article 25/7, paragraph (2), of the amended law on the police function of 5 August 1992