

Opinion in relation to the consultation of the City Council of (...) on different data protection issues arising from the performance of a compliance, financial and legal audit of a municipal company

A letter from the City Council of (...) is presented to the Catalan Data Protection Authority in which it raises several questions regarding data protection, arising from the compliance, financial and legal audit carried out on a company municipal

Attached to the consultation letter is the set of specific technical clauses for the contracting of the aforementioned audit services. Also attached, albeit incompletely, is the set of particular administrative clauses.

Having analyzed the request and the accompanying documentation, and having seen the report of the Legal Counsel, the following is ruled.

I

(...)

II

The City Council of (...) (hereinafter, the City Council) states, in its consultation, that it commissioned a third party to carry out a compliance, financial and legal audit regarding a wholly municipal capital company with the purpose of examining its management during the years between 2006 and 2015, both included. In particular, he states that he was interested in auditing the management carried out by said municipal company in matters of public procurement.

Then, it is agreed that in the contract for the award of audit services, of which the corresponding set of particular technical clauses is attached, it has been planned that the resulting audit report will be presented in a public hearing before the citizens of the municipality.

In view of these facts, this Authority poses the following questions:

- a) If in the audit report, which will be delivered to the City Council, the identification data of the natural and legal persons with whom the municipal society signed the audited contracts can be indicated.
- b) If the same data can be indicated in the presentation of the said report in public hearing.
- c) And what security measures is the City Council obliged to adopt in relation to the content of the audit report it receives.

These issues are analyzed below from the point of view of the right to the protection of personal data (Article 18.4 CE), which is the perspective from which this opinion should be issued.

III

Paying attention to the terms in which this query is formulated, it is necessary to bear in mind, at the outset, that the legislation in force attributes to local bodies the functions of internal control of their management

economic, financial and budgetary, as well as on that carried out by the autonomous bodies and commercial companies that depend on them.

Article 136 of Law 7/1985, of April 2, regulating the bases of the local regime (hereafter, LRBRL) provides that:

- "1. The public function of control and internal auditing of economic, financial and budgetary management, in its triple meaning of auditor function, financial control function and efficiency control function, will correspond to an administrative body, with the name of Municipal General Intervention.
2. The general municipal intervention will exercise its functions with full autonomy with respect to the municipal bodies and entities and managerial positions whose fiscal management, having full access to the accounting and all the documents necessary for the exercise of its functions.
3. Its holder will be appointed from among local administration officials with national qualifications."

For its part, the Royal Legislative Decree 2/2004, of March 5, which approves the revised Text of the Law regulating local finances (hereafter, TRLHL), specifies that local entities exercise the functions of internal control regarding of its economic management, of the autonomous bodies and of the mercantile companies that depend on them, in its triple meaning of intervention function, financial control function and effectiveness control function (article 213).

In articles 214, 220 and 221 of this TRLHL, the scope of application and the modalities of exercise of the three functions (interventionist, financial control and effectiveness control) are specified, in which the function is broken down public control and internal audit.

Regarding, specifically, financial control, article 220 of the TRLHL establishes that:

- "1. The purpose of the financial control will be to verify the economic-financial performance of the services of the local entities, their autonomous bodies and the mercantile companies dependent on them.
2. The purpose of said control will be to report on the appropriate presentation of financial information, compliance with applicable rules and guidelines and the degree of effectiveness and efficiency in achieving the intended objectives.
3. The financial control will be carried out by auditing procedures in accordance with the auditing standards of the public sector.
4. As a result of the control carried out, a written report must be issued in which it is stated how many observations and conclusions are deduced from the examination carried out. The reports, together with the allegations made by the audited body, will be sent to the Plenary for consideration."

In the present case, the City Council, in exercise of this power of control and internal inspection, has contracted the auditing services provided by a third party, for the purposes of carrying out a compliance and financial audit regarding the management carried out by a municipal society during the years 2006 to 2015.

In accordance with the aforementioned Public Sector Audit Rules (Article 220.3 TRLHL), approved by Resolution of the General State Audit of February 14, 1997 and published by Resolution of September 1, 1998 financial audit "intends to obtain reasonable assurance about whether the accounting in general, and the annual accounts and other financial statements, faithfully express the result of the management and its adequate patrimonial reality, according to generally accepted norms and principles"

(2.1.6) and the compliance audit "seeks to verify that the acts, operations and management procedures have been carried out in accordance with the norms, dispositions and directives that are applicable" (2.1.7).

To this effect, "sufficient, relevant and valid evidence (physical, documentary, testimonial, analytical and computer) must be obtained in order to achieve a reasonable judgment base on which to support the opinion, comments, conclusions and recommendations" (5.3. 1 and 5.3.2).

In this same sense, article 222 of the TRLHL establishes that "the officials who are in charge of the supervisory function as well as those who are appointed to carry out the financial and efficiency controls, will exercise their function with full independence and may collect any antecedents they consider necessary, carry out the examination and verification of the books, accounts and documents they consider accurate, verify archives and accounts and request from the appropriate person, when the nature of the act, document or file that must be intervened requires it, the technical reports and advice they deem necessary."

As can be seen from the aforementioned regulations, financial control, through audit procedures, involves carrying out various operations for its correct compliance, which must necessarily allow access and processing of information and documentation related to any of the areas of action to be audited, including personal information (Article 3.a) Organic Law 15/1999, of December 13, on the protection of personal data (hereinafter, LOPD)).

From the point of view of data protection, this access to personal information must comply with the principles of purpose and minimization of data (article 4 LOPD and article 5.1.b) ic) of Regulation (EU) 2016 /679, of the Parliament and of the European Council, of April 27, 2016, General Data Protection Regulation (hereafter, RGPD), applicable from the next May 25, 2018), in such a way that it must limit to the minimum personal data necessary to achieve the purpose of control intended with it
your treatment

IV

Having said that, it should be noted that, although the legislation examined enables the processing of those personal data that are necessary for the legitimate exercise of the internal control function that corresponds to the local bodies, either by the general intervention itself or by natural or legal persons authorized for that purpose, this does not mean that this data must necessarily be included in the report resulting from the audit that is carried out
term

In fact, taking into account the nature of the audit itself being examined, to which reference has been made before, it does not appear that the report must necessarily contain any personal data beyond the identification data of the audit person who signs it, as required by applicable public sector auditing standards (6.3.16).

However, it cannot be ruled out that, depending on the results obtained, there may be other personal information. In this sense, the City Council makes express reference in its consultation to the fact that the aforementioned report can indicate the identification data of the persons awarded the contracts signed by the audited municipal company.

In the absence of specific information on the personal data that could be included in the audit report, the examination of the adequacy of the information included in this

report to the data protection regulations will focus exclusively on the data on the awardees mentioned by the City Council.

Well, since this is the controversial information, it should be noted that, from the point of view of the right to the protection of personal data, there would be no inconvenience for it to be included in the audit report.

At the outset, it must be borne in mind that in most cases this identifying information will refer to legal entities or natural persons (individual entrepreneurs) who hold the status of traders, industrialists or shipowners, which are excluded from the application regime of the protection of personal data (article 2.3 of the LOPD Deployment Regulations, approved by Royal Decree 1720/2007, of December 21).

For the case where it is about identifying data of entrepreneurs who do not hold this status of merchants, industrialists or shipowners, or of liberal professionals, it must be borne in mind that, despite the fact that it refers to natural persons, it would, in any case, be of information related to their economic or professional sphere insofar as they have been awarded a contract tendered by the audited municipal company.

Its inclusion in the audit report, from the point of view of data protection, would be justified to the extent that its identification was relevant for the purposes of explaining the results obtained in the examination or review of the adaptation of the procurement procedures carried out by said company to the legislation on public procurement (for example, in the event of any irregularity being detected), objective to which the audit contracted by the City responds (article 4 LOPD and article 5.1.b) RGPD). However, the personal information that is stated in this regard should be limited to the name and surname of the natural person awarded the contract (Article 5.1.c) RGPD).

On the other hand, it must be taken into account that the information relating to the identity of the successful tenderer is part of the information that, in matters of public procurement, must be published on the electronic headquarters and websites of the obliged subjects, in accordance with Law 19/2014, of December 29, on transparency, access to public information and good governance (hereinafter, LTC).

Specifically, article 13.1 of the LTC establishes that:

"1. Transparency in the area of contracts entered into by obligated parties is applicable to all contracts, including patrimonial and minor contracts. The public information relating to contracts must include: (...) d) The contracts signed, with the indication of the object, the tender and award amount, the procedure used to contract and the identity of the successful tenderer, the duration, the number of tenderers, the award criteria, the comparative table of offers and the respective scores, and also the agreements and technical reports of the procurement process. This information must be up-to-date and refer to at least the last five years. (...)"

This is, therefore, information that must be of general knowledge, given that otherwise it would not be possible to effectively control the awarding of the contract in question and, therefore, the management of public resources (purpose to which the LTC responds (article 1.2)), it would not make much sense to limit the possibility of this identity being included in the audit report, which also aims to control the recruitment procedures carried out by the company municipal, and especially when the report is addressed to the City Council (in plenary session), which is primarily responsible for the exercise of this control (article 220 TRLHL).

Having said that, in view of the provisions of this article 13.1.d) of the LTC, there would also be no inconvenience, from the point of view of the right to data protection, for this information -identity of the successful tenderer- was disclosed in the presentation of the audit report in public hearing.

Point out, at this point, that the LTC also establishes the obligation to publish on its electronic headquarters or website the audit reports of accounts (article 11.1c)), publication which, to the extent that it involves the dissemination of personal data , must be carried out in accordance with the LOPD.

Thus, by applying the principle of data minimization (article 4.2 LOPD and article 5.1.c) RGPD), in the publication of the audit report it will be necessary to exclude those unnecessary personal data in order to achieve the intended purpose of transparency. For example, with respect to the identification data of the auditor, their handwritten signature should be omitted from the report, given that this data is not strictly necessary to be able to identify the person who performed the audit (it is to be able to know the name and surnames). This, without prejudice to expressly state on the electronic headquarters or website that the original signed documentation is available for the purposes of which it can be consulted.

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The City Council also sets out in its consultation letter what security measures it is obliged to adopt in relation to the content of the audit report it receives.

Article 9.1 of the LOPD establishes that "the person in charge of the file and, where applicable, the person in charge of the treatment must adopt the necessary technical and organizational measures that guarantee the security of personal data and prevent their alteration, loss, treatment or unauthorized access, taking into account the state of the technology, the nature of the data stored and the risks to which they are exposed, whether they come from the action human or of the physical or natural environment."

These security measures are regulated in Title VIII of the RLOPD, which classifies them into three different levels - basic, medium and high - depending on the type of personal data to be processed in each case, which remain temporarily valid, while the RGPD does not apply.

In the present case, if, apart from the identity of the auditee, the audit report only contains the identification data of the awardees of the contracts signed with the audited municipal company, it would be appropriate to apply basic level security measures .

Point out, with respect to the work process of preparing the report, that, from the point of view of data protection, the auditor's access to the personal information he needs for the exercise of his functions requires the formalization of a treatment commission contract, under the terms of article 12 of the LOPD. Likewise, agree that, from the point of view of information security, it would be advisable for this access to take place in the offices of the audited municipal company and that, in any case, it is necessary to guarantee the confidentiality of the information to that you have access (article 10 LOPD). This, without prejudice to the implementation of those other security measures that may be relevant.

Having said that, it should be noted that the RGPD sets up a security system that is not based on the basic, medium and high security levels provided for in the RLOPD, but on determining, following a prior risk assessment, which security measures security are necessary in each case

(Recital 83 and article 32). Remember, that data processing that started before May 25, 2018 must adapt to this system before that date.

In accordance with the considerations made so far in relation to the query raised, the following are made,

Conclusions

From the point of view of data protection, there would be no inconvenience in stating in the report resulting from the financial and compliance audit carried out for a municipal company the identity of the persons awarded the audited contracts, insofar as it is relevant information for the purposes of explaining the results obtained in the examination of the recruitment procedures carried out by said company.

Nor would there be any inconvenience in disseminating this information during the presentation of the audit report in a public hearing, given the provisions on active publicity of the LTC.

To the extent that the audit report contains only this identifying data, basic level security measures will need to be implemented.

Barcelona, January 29, 2018