

Ref.: CNS 14/2018

Opinion on the consultation made by a City Council in relation to requests for access to reserved information files prior to the initiation of disciplinary proceedings.

A letter from a City Council is presented to the Catalan Data Protection Authority in which it is requested that the Authority issue an opinion in relation to requests for access to files of information reserved prior to the initiation of 'a disciplinary procedure.

Specifically, according to the consultation letter, in response to requests from people affected by confidential information, as well as from the City Council's Personnel Board, the Authority's opinion is requested in relation to three different issues.

First.- In the framework of a reserved information that has been opened to investigate certain facts, the City Council raises the following doubt: the person to whom the instructor has taken a statement, and who is aware of the existence of these investigative actions, requests a copy of the entire file. Do you have the right to obtain a copy once the processing of previously reserved information has been completed?

Second.- The Personnel Board would have requested the Mayor to obtain information on how much reserved information has been opened, the reasons why it has been opened, in what state it is currently and how those that have been resolved finished The City Council considers whether they have the right to access this information.

Third.- The City Council questions whether anyone has the right of access to these reserved information files once they have been completed, as well as to the disciplinary files under the protection of transparency legislation.

Having analyzed the query, which is not accompanied by any other documentation, and in accordance with the report of the Legal Adviser, I issue the following opinion:

I

(...)

II

In accordance with article 3.i) of the LOPD, any disclosure of data made to a person other than the interested party constitutes a transfer or communication of personal data. In general, personal data can only be communicated to a third party for the fulfillment of the purpose directly related to the legitimate functions of the transferor and transferee, with the prior consent of the interested party. However, article 11.2 a) the LOPD enables the assignment of

personal data without the consent of the interested party when this is covered by a rule with the rank of Law.

Law 19/2014, of December 29, 2014, on transparency, access to public information and good governance, establishes in article 18 that "people have the right to access public information, which reference article 2.b, in an individual capacity or in the name and representation of any legally constituted legal person", (paragraph 1). The mentioned article 2.b) defines "public information" as "the information prepared by the Administration and that which it has in its power as a result of its activity or the exercise of its functions, including the which are supplied by the other obliged subjects in accordance with the provisions of this law".

The information that may be contained in an information file prior to the start of a sanctioning or disciplinary procedure, is "public information" for the purposes of transparency legislation and remains subject to the access regime provided for in this Law. Thus, in accordance with article 20 and s. of Law 19/2014, the right of access to public information may be denied or restricted for the reasons expressly established in the laws.

This preliminary information phase is opened with the aim of investigating some facts and determining whether or not they are likely to motivate the initiation of a disciplinary procedure, the identification of the person or persons who could be responsible and the relevant circumstances concurrently, it has the character of reserved, as established in article 275 of Decree 214/1990, which approves the Regulation of personnel in the service of local entities.

It does not properly constitute an administrative procedure and the reserved nature of these investigative actions (knowledge of them may entail a clear prejudice to the result of the same), prevents that during their processing it is possible to facilitate access to the documentation that it is in the file. This affects even the person who is being investigated.

In this sense, Law 19/2014 of December 29, 2014, on transparency, access to public information and good governance, provides in article 21.1 that "the right of access to public information may be knowledge or disclosure of the information entails a detriment to: (...) b) The investigation or sanction of criminal, administrative or disciplinary infractions. "

Therefore, once this phase of previously reserved information is concluded with the adoption of a decision, whether it is to archive the actions or to agree to initiate disciplinary proceedings, it would probably no longer apply the limit provided for in article 21.1. b) of Law 19/2014, and it will be necessary to analyze whether any other limitations of those established in articles 20 and ss of the LTC or in any other law apply. Specifically, with regard to the personal information it may contain, it will be necessary to analyze the nature of the data requested, and apply the criteria provided for in the same Law to determine whether or not access to this personal information can be facilitated.

In general, these types of files tend to contain a lot of personal information, not only of the person investigated or reported, but also of third parties who intervene, such as the reporting person or other people who may testify as witnesses of the facts that are investigated.

III

The first question arises in relation to the right of access that a person may have who gives a statement during the processing of a reserved information request and requests a copy of all the documentation in the file. Specifically, the doubt arises regarding the possibility of facilitating access to the file for this person once the preliminary information phase has been completed.

This phase of reserved information could have ended with the filing of the investigative actions carried out or with the initiation of disciplinary proceedings against the investigated worker. In this second case, the reserved information could have been incorporated into the disciplinary procedure, as provided for in article 38 Decree 243/1995, of June 27, which approves the Regulation on the disciplinary regime of the public service Administration of the Generalitat of Catalonia, also applicable to the staff of local bodies (article 237.1 Decree 214/1990)). This distinction may be relevant for the purposes of analyzing the legal basis that in one case or another could legitimize the processing of personal data that is being considered. This leads us to distinguish in this analysis the two situations raised.

IV

In the event that the file of previously reserved information has concluded with an archive of the actions, the access requests must be resolved in accordance with the transparency legislation, taking into account what are the personal data that would be affected and who requests access to the file.

The very nature of the actions carried out during the reserved information phase already indicates to us that the information they may contain is related to the commission of some type of infraction or punishable offense in disciplinary matters. It is likely that the file may contain personal information of the person being investigated and therefore directly affected by the outcome of the actions, but also of other people, such as the reporting person and witnesses, as well as information about the people who have intervened in the processing of the file due to his status as a staff member in the service of the Administration.

Their legal position in the file may be relevant, as we will analyze later, when assessing the legitimacy of these people to access the personal data of the rest (third parties). However, the first thing that must be recognized for all of them is the right of access to the personal data referring to them that may be included in the documentation of the file.

Thus, with regard to access to the data referred to the same person requesting access, article 24.3 of Law 19/2014, of December 29, on transparency, access to public information and good government (hereinafter, LTC), establishes that "requests for access to public information that refer only to the applicant's personal data must be resolved in accordance with the regulation of the right of access which establishes the legislation on the protection of personal data."

In this sense, article 15 of Organic Law 15/1999, of December 13, on the protection of personal data (hereafter LOPD) establishes the following:

"1. The interested party has the right to request and obtain free of charge information about their personal data being processed, the origin of the data and the communications made or planned to be made.

2. The information can be obtained through the mere consultation of the data through visualization, or the indication of the data that is the subject of treatment through writing, copy, telecopy or photocopy, certified or not, in a legible and intelligible form legible, without using keys or codes that require the use of specific mechanical devices.

3.(...)."

Article 23 of the LOPD allows access to be limited when dangers may arise for the defense of the state, public security, the protection of rights and freedoms of third parties or the needs of police investigations that are being carried out, as well as in those cases where access could hinder the fulfillment of tax obligations or the actions of the tax inspection.

Apart from these cases, article 30.2 of the RLOPD also provides for the possibility of denying access "in the cases in which a law or a rule of community law directly applicable or when this law or rule prevents the person in charge of treatment reveal to those affected the treatment of the data to which the access refers."

In accordance with these precepts, the person investigated would have the right to know not only the direct information about him that the City Council is dealing with (behavior, attitudes or facts attributed to him), but also the origin of the information and the any communications that have been made or are expected to be made.

It should be pointed out that if the source of the information had been the statement of another natural person (e.g. letter of complaint submitted by another person), he could have access not only to the facts related by that person that are imputed to him , but also, even, to his identity, without prejudice to the possibility that this person exercises his right of opposition in this regard (article 6.4 LOPD). All this, unless one of the mentioned limitations applies.

For his part, the reporting person could have access to the data referring to his person (eg the report or his statement etc.), and the same must be said regarding the access of witnesses to their own statement.

v

With regard to the information relating to the people who have intervened in the processing of the information reserved by their status as personnel in the service of the public administration, as would be the case of the instructing person or the one who agrees the start or the file of the previous information, which is recorded in the file, the provisions of article 24.1 LTC must be taken into account, according to which:

"1. Access to public information must be given if it is information directly related to the organization, operation or public activity of the Administration that contains merely identifying personal data unless, exceptionally, in the specific case it has to prevail over the protection of personal data or other constitutionally protected rights."

In accordance with this precept, the name and surname of the person who initiated or filed the complaint or the person investigating the file could be revealed. The intervention of these people is a consequence of the functioning of the Administration, given that their identification would correspond to the functions attributed to the person in question by virtue of their position.

Beyond the identification data of public employees who have intervened in the file, access to which is governed by the provisions of article 24.1 LTC, and with respect to the rest of third-party data, the established criteria must be taken into account in articles 23 and 24.2 LTC.

VI

Regarding specially protected data, article 23 LTC states that: "requests for access to public information must be refused if the information sought contains specially protected personal data, such as relating to ideology, trade union affiliation, religion, beliefs, racial origin, health and sex life, and also those relating to the commission of criminal or administrative offenses that do not entail public reprimand in the infringer, unless the affected party expressly consents by means of a written document that must accompany the request.

For its part, article 15.1 of Law 19/2013 establishes that "(...) If the information includes specially protected data referred to in section 3 of article 7 of Organic Law 15/1999, of December 13, or data relating to the commission of criminal or administrative offenses that did not entail a public reprimand to the offender, access may only be authorized if the express consent of the affected person is obtained or if the latter is protected by a law with the rank of Ley."

Taking into account the nature of the previously reserved information, it seems foreseeable that there may be information referring to the commission of disciplinary offenses by the person under investigation. Nor can it be ruled out that the information contains other specially protected data (e.g. health data). It must be made clear that the aforementioned articles would prevent access to it, except for the express and written consent of the affected person that must accompany the request. Access, in any case, should be done in a dissociated manner, that is to say in such a way that the affected persons cannot be identified either directly or indirectly.

The person investigated or reported could indeed access the information related to the commission of infractions or disciplinary offenses contained in the file. In this case, it would be your own personal information to which you should be able to access in accordance with articles 24.3 LTC and 15 the LOPD.

Doubts could arise in cases in which it appears from the actions resulting from the investigations that it has not been proven that the facts investigated could constitute an infringement. The information in this case would refer to the non-commission of an offense by the investigated (affected) worker. Certainly, the line in these cases can be more diffuse, and the circumstances of each specific case should be considered.

It should be clarified in this regard, that the fact that the investigation of the facts has not resulted in the initiation of a disciplinary procedure, does not imply that the information about this person under investigation is not related to the commission of administrative infractions. Consider, for example, the case where the behavior of a certain worker constitutes one of the offenses provided for in the regulations but the facts are not punishable because the offense has expired.

Be that as it may, it must be borne in mind that the mere fact of providing information about a person who has been investigated for facts that could constitute a disciplinary offence, could cause serious damage to the privacy of the affected person, and the degree of interference it involves will depend on the nature and seriousness of the facts that have been investigated. This means that despite the doubt that may arise regarding its inclusion in the access regime of article 23 LTC, a reasoned weighting between the different rights and interests at stake should be done in accordance with article 24.2 LTC, and which we will analyze below, would also oblige us to take into account this circumstance that could lead to a denial of access to this information.

VII

With respect to other types of information from third parties (complainant, witnesses, etc.) that may be included in these files, a prior weighting will need to be done between the different rights and interests at stake, all this in accordance with article 24.2 LTC: "... access to information can be given, with prior weighting of the public interest in disclosure and the rights of the affected persons. To carry out this weighting, the following circumstances must be taken into account, among others:

a) The elapsed time. b)

The purpose of the access, especially if it has a historical, statistical or scientific purpose, and the guarantees offered. c) The fact that it is data relating to minors. d) The fact that it may affect the safety of people. (...)."

When making this weighting, it is necessary to take into account the specific circumstances of each case, and in this sense it will be relevant when assessing the different rights and interests at stake, the position held by each of the people who have intervened as declarants and they request access, which can be, as we have pointed out, the investigated or reported (person directly affected by the result of the actions), the complainant, or one of the witnesses. The position of the person requesting access can be decisive when resolving the eventual access to third party personal data.

Linked to the position of the person requesting access, the explicit purpose pursued by the access must also be taken into account. It is certainly not mandatory to include in the request the reasons for which access is requested (art. 26.2 of Law 19/2014), but in the event that the purpose pursued is not included, this element cannot be had into account when making the weighting imposed by article 24.2 of Law 19/2014.

Once the purpose has been defined, it will be necessary to assess the possibility of providing the information anonymously. This would be the first measure that should be taken if the purpose pursued by the access is also achieved without the need to sacrifice the privacy of the people affected.

If this is not possible, it will be necessary to assess what is the personal information of these third parties that would be relevant and necessary to achieve the purpose, and evaluate on the other hand the degree of affect that the communication of this data may have for the person affected

Point out in this regard that the principle of data minimization (article 4.1 LOPD and article 5.1.c) of Regulation (EU) 2016/679, of the Parliament and of the European Council, of April 27, 2016, General Data Protection (hereafter, RGPD), applicable from May 25, 2018) requires that any data processing that takes place (such as data communication or access) is limited to the minimum data necessary to achieve the intended purpose with this treatment.

In the event that the person requesting access is the person being investigated, the fact of having a direct interest in the outcome of these proceedings places them in a position of legitimacy superior to the rest of the applicants, and could justify wider access to the personal information of third parties than the rest of the people involved.

Even so, it cannot be generalized and the circumstances of the specific case will have to be taken into account. Remember, however, that in any case, the principle of data minimization to which we have already referred must be respected, among others.

In the event that it is the person reporting the facts that are the subject of investigation who requests access, and beyond that the information of the reporting party is limited to the commission of administrative or disciplinary infractions (article 23 LTC), it is appropriate to note that the complainant would not have the status of an interested party in this file.

In this regard, it should be borne in mind that the repeated jurisprudence of the Supreme Court (the STS of November 25, 2013 serves for all) has established that the mere status of complainant does not entail the recognition of the consideration of an interested person and that, therefore, he is not recognized as legitimate to challenge the archive decision in an administrative or contentious way. This without prejudice to the fact that the specific regulations of the procedure provide that the initiation of the disciplinary procedure that is opened is communicated to the reporting person, as provided for in article 64.1 of Law 39/2015 on the common procedure of public administrations.

In this sense, article 274 of Decree 214/1990, of July 30, which approves the Regulation of personnel in the service of local entities, establishes that "The initiation of the file must be communicated, if where applicable, to the complainant", but instead notification of the resolution is not foreseen.

In the event that this procedure is not initiated, there is also no specific obligation to notify the complainant of the filing decision.

This does not mean, however, that it may arise through an access request, the possibility of informing the person making the complaint about the file of their complaint and the reasons why it has been taken this decision, once the circumstances of the case have been evaluated, and notwithstanding that the limitations provided for in articles 23 LTC and 24 LTC are equally applicable.

In the event that it is one of the witnesses who requests access, and regardless of whether he can be provided with the document that includes his own statement, access to the file would run into the limitation of article 23 LTC . This without prejudice to the fact that, as far as possible, the information may be provided in an anonymized manner.

VIII

In the event that the actions of previously reserved information have concluded with the initiation of a disciplinary procedure, and these are incorporated into the same, the person who is imputed, has the status of an interested party in this procedure, in accordance with the art 4.1 LPACAP.

The first additional provision of the LTC establishes that "the access of the interested parties to the documents of the administrative procedures in process is governed by what is determined by the legislation on legal regime and administrative procedure."

Article 53.a) of the LPACAP provides that interested persons have the right to access and obtain copies of the documents contained in the procedures in which they have this condition.

For its part, article 26 of Law 26/2010, of August 3, on the legal regime and procedure of the public administrations of Catalonia, also establishes that "citizens who have the status of persons interested in a administrative procedure in progress have the right to access the file and obtain a copy of the documents that are part of it. If the documents are in electronic format, citizens have the right to obtain electronic copies."

Specifically in the disciplinary field, article 285 of Decree 214/1990 establishes that "the list of charges must be notified to the accused and he must be granted a period of ten days so that he can answer it, with the allegations it deems appropriate for its defense and with the contribution of the documents it deems of interest. In this procedure, he must request, if he considers it appropriate, the practice of the evidence he believes necessary for his defense, as well as access to the entire file, by himself or through his legal representative."

The applicable administrative procedure legislation recognizes the right of interested persons to access the information contained in the procedure and to obtain copies of it in fairly broad terms. On the other hand, the interested parties have the right to use the resources provided for by the legal system regarding the administrative decisions that affect them.

This does not mean, however, that this right of access is an absolute right. It should be borne in mind that if it comes into conflict with other rights, as in this case it could be the fundamental right to the protection of personal data (Article 18.4 CE), it will be necessary to weigh up the different rights at stake, in order to decide which must prevail and to what extent.

This is, in fact, recognized by article 82.1 of the aforementioned LPACAP by establishing that the obtaining of copies or access to the file of the persons interested in the hearing procedure must take into account the exceptions provided for in the transparency legislation.

In the same vein, article 51 of Law 26/2010, in regulating the hearing procedure, establishes that the possibility of accessing the file by interested persons will not affect "the data excluded from the right of "access".

Considering that the primary purpose of the right recognized in the aforementioned article 53.a) of the LPACAP (and in similar terms to article 26 of Law 26/2010 and Decree 214/1990) is to guarantee the right of defense (Article 24 EC) of the person interested in the procedure, in order to admit this person's access to sensitive information about a third party (complainant) that may be included in the documentation of the file, it would be necessary that this information is relevant to the exercise of your right of defence.

For other types of personal information of third parties that may be recorded, it will be necessary to take into account the provisions of article 4 of the LOPD and 5 of the RGPD, which require that any data processing that is carried out (such as the data communication or access) is limited to the minimum data necessary to achieve the intended purpose of this treatment.

On the other hand, access by third parties who had intervened in the previous information phase, be it the complainant or other witnesses, would not have the status of interested parties in the disciplinary procedure, and therefore, the access regime applicable would not be the administrative procedure regulations but the transparency legislation.

Taking into account that the requested information would be part of a disciplinary procedure, and therefore of a punitive nature, access should be limited, unless the request is accompanied by the express written consent of the person imputed (article 23 LTC).

All this, without prejudice to the fact that they can access information about their own personal data, in accordance with what is provided for in articles 15 LOPD.

IX

The second issue that arises refers to the possibility of providing the Personnel Board with access to information on the number of open reserved information, the reasons for which it would have been opened, in what state they are and how they would have solved the ones that have already ended.

Personnel Boards, as specific bodies representing civil servants (art.39.1 Royal Legislative Decree 5/2015, of October 30, approving the revised text of the Basic Employee Statute Law public), are legitimated to exercise a series of functions in defense of the rights and interests of public workers, provided for in the specific regulations.

The first additional Provision of Law 19/2014 provides that 2. Access to public information in matters that have established a special access regime is regulated by their specific regulations and, as a supplement, by this law."

The workers' representative bodies have a specific system of access to information provided for in article 40 of the TRLEBEP, a system that must be applied as a matter of priority, without prejudice to the additional application of the access system provided for in the legislation of transparency

Article 40 of the TRLEBEP, relating to the functions and legitimacy of the representative bodies, provides: "1. Staff boards and staff delegates, if applicable, have the following functions, in their respective areas: (...) c) **Be informed of all sanctions imposed for very serious offences.**

On the other hand, article 41.1. TRLEBEP has:

"1. The members of the Personnel Boards and the Personnel Delegates, in their case, as legal representatives of the officials, will have in the exercise of their representative function the following guarantees and rights: (...) c) The hearing in the disciplinary proceedings to which its members could be subjected during the time of their mandate and during the year immediately following, without prejudice to the hearing to the interested party regulated in the sanctioning procedure. (...)"

Beyond this, there is no other specific provision in terms of disciplinary regime, and therefore access will need to be analyzed taking into account the provisions of the transparency legislation, without prejudice to taking into account the role of workers' representation held by the Personnel Board and the functions that belong to it.

Having said that, and with regard to the specific information that the Personnel Board would have requested, communicate to it the number of previously reserved information files opened by the City Council, the reasons for when they were opened, and regarding the completed files, how many have been filed and how many have ended with the initiation of a disciplinary file, should in principle not pose any inconvenience from the perspective of the protection of personal data, as long as this information is provided in an aggregated manner and without it being possible to directly identify the workers who are the subject of these investigations.

It cannot be ruled out, however, that through this information the affected worker can end up being identified by indirect means and without making disproportionate efforts. It should be remembered that any numerical, alphabetical, graphic, photographic, acoustic or any other type of information relating to physical persons identified or identifiable without disproportionate efforts is understood as personal data (arts. 5.1.f) and 5.1.o) of the Regulation of deployment of the LOPD, (RLOPD), approved by Royal Decree 1720/2007, of December 21).

If it is possible to identify the person investigated, and given that in principle it would be data related to the commission of administrative offenses (especially protected), access must be limited (Article 23 LTC). Therefore, the City Council will have to take into account the way to facilitate

the reasons for which these information files have been opened, in order to ensure that the details of the information do not allow the identification of the affected workers.

Therefore, the requested information could be provided, as long as it does not allow the direct or indirect identification of the affected workers. This without prejudice to the fact that with respect to those reserved information that are still being processed, the limit provided for in article 21.1.b) LTC may apply.

X

With regard to the third question, the consultation raises doubts in relation to the right of access that any citizen who requests it may have, to the records of information reserved prior to the initiation of a disciplinary procedure that has already ended, on the one hand, and to the disciplinary files, on the other.

We understand that in this case, the query refers to an access requested by any person (employee or not) who has not intervened in the aforementioned files. To resolve this question, it is again necessary to take into account the criteria provided for in articles 23 and 24 LTC.

In this sense, and with regard to specially protected data, it will be necessary to limit access unless the express and written consent of those affected (data holders) is available at the time of formulating the request, in accordance with article 23 LTC.

This criterion must be applied both to the file of the disciplinary procedure and to the information reserved prior to the start of the same and which has already ended.

Doubts may arise with the previous information completed with a file of actions in which it follows from the actions resulting from the investigations that it has not been proven that the facts investigated could constitute an infringement or disciplinary offence.

Now, in the same line as that pointed out in the legal basis V, the fact of disclosing information about the investigation carried out to a person in relation to a conduct or facts in order to find out whether or not they are punishable, even if it is finally determined that they are not, it could mean serious damage to the privacy of the person being investigated.

On the other hand, for the purposes of transparency, and in the absence of any other purpose, the purpose of the access must be framed within the evaluation and control of the performance and the retention of accounts of the Administration to the citizenry. For this purpose, it does not seem that a generalized access by any citizen to personal information whose disclosure could cause, as has been pointed out, a serious interference in the privacy of the affected person could be justified.

XI

Finally, it is worth remembering the importance of taking into account the right of information of the affected persons in relation to requests for access to their personal data by third parties, for the purposes of exercising the right of opposition in accordance with articles 5.1 d) and 6.4 LOPD (rights provided for in articles 13 and 21 RGPD).

Thus, in accordance with article 6.4 LOPD: "4. In cases where the consent of the affected person is not necessary for the processing of personal data, and as long as a law does not provide otherwise, the latter may object to its processing when there are reasonable and legitimate reasons for this to a specific personal situation. In this case, the person in charge of the file must exclude the data relating to the affected person from the processing."

At the same time and in case the applicable access regime is transparency legislation, it should be noted that in accordance with article 31.1 LTC "1. If the request for public information may affect the rights or interests of third parties, in accordance with the provisions of this law, in the event that the potential affected are identified or are easily identifiable, they must be transferred from the request, and they have a period of ten days to present allegations if these may be decisive for the meaning of the resolution."

This Authority has pointed out in its opinions the importance of complying with the obligation to transfer access requests to those people whose rights and interests could be affected by access. Thus, these people will be able to express what they think is appropriate in defense of their rights and interests, and if they do, the City Council will be able to make a more accurate assessment when assessing the circumstances of the specific case.

Conclusions

Once the reserved information files have been concluded, the people who have given a statement during the investigation have the right to access the personal information contained in the file about themselves, in accordance with articles 24.3 LTC and 15 of the LOPD.

This same criterion is used in the event that the previous information has been incorporated into the disciplinary procedure that is initiated.

The access to personal data of third parties contained in the respective files must be governed by the criteria established in articles 23 and 24 LTC, in the terms set out in the foundations of this opinion. In the event that this reserved information has been incorporated into the disciplinary procedure that is opened, the accused person's access is governed during its processing by the provisions of the administrative procedure legislation.

The Personnel Board could access the information on the number of open reserved information, the reasons and the result of those that have ended, provided that this information is provided in such a way that the identification of the persons investigated is not possible.

The access of a citizen to the personal information contained in the reserved information files once concluded and to the disciplinary files, would be limited by article 23 LTC, unless the request for access is accompanied by the express and written consent of the affected person.

Barcelona, April 4, 2018