

Opinion in relation to the query raised by a City Council regarding councilors' access to the register of entries and exits of council documents

A letter issued by the Mayor of a City Council is submitted to the Catalan Data Protection Authority in which the Authority's opinion is requested regarding the manner in which access to the register of entries and exits of City Council documents by any Councilor of the Corporation.

Having analyzed the request, which is not accompanied by any other documentation, and having seen the report of the Legal Counsel, the following is ruled

I

(...)

II

This opinion is issued in accordance with Regulation (EU) 2016/679, of the Parliament and of the European Council, of April 27, 2016, General Data Protection (hereinafter, RGPD), which will be fully applicable on next May 25

The RGPD applies "to the total or partially automated processing of personal data, as well as to the non-automated processing of personal data contained or intended to be included in a file" (article 2.1), meaning by personal data "all information about an identified or identifiable natural person ("the interested party").

In this sense, the RGPD specifies that it is identifiable "every person whose identity can be determined, directly or indirectly, by partialing it by means of an identifier, como por ejemplo a number, an identification number, location data, an online identifier or a or various elements of the physical, physiological, genetic, psychological, economic, cultural or social identity of said person" (article 4.1)).

It should also be taken into account that the RGPD defines data processing as "any operation or set of operations carried out on personal data or sets of personal data, whether by automated procedures or not, such as collection, registration, organization, structuring, conservation, adaptation, modification, extraction, consultation, use, communication by transmission, diffusion or any other form of enabling access, comparison or interconnection, limitation, suppression or destruction" (article 4.2)).

Thus, there can be no doubt that the information contained both in the Register of entry and exit of documents of the City Council and in the documents recorded there may contain information of a personal nature linked to the fact of having presented writings, or linked to the object of these writings. These data, to the extent that they refer to identifiable natural persons, are considered personal data and are therefore protected by the regulations on the protection of personal data.

Consequently, any treatment of this data, including the collection or any subsequent use or treatment of it - for example, the access of

councilors to this information or the subsequent use of this information-, is subject to the principles and guarantees contained in the data protection regulations.

III

The RGPD establishes that it is necessary to have a legal basis that legitimizes the treatment, either the consent of the affected person or one of the other circumstances provided for in the same precept, but now that, "the treatment is necessary for the fulfillment of a mission carried out in the public interest or in the exercise of public powers conferred on the controller" (article 6.1.e)) and this is recognized in a legal basis in accordance with the provisions of sections 2 and 3 of the same article.

Section 3 of this precept provides: "the basis of the treatment indicated in section 1, letters c) and e), must be established by:

- a) the Law of the Union, or
- b) the Law of the Member States that applies to the person in charge of treatment

The purpose of the treatment must be determined in said legal basis or, in relation to the treatment referred to in section 1, letter e), it will be necessary for the fulfillment of a mission carried out in the public interest or in the exercise of public powers conferred to the person in charge of the treatment."

It is necessary to keep in mind, although it is still pending approval, the Draft organic law on the protection of personal data in order to adapt the Spanish legal system to the RGPD (text published in the BOCG, series A, no. .13-1, of 24.11.2017) specifically, in article 8, it states that: "2. The treatment of personal data can only be considered based on the fulfillment of a mission carried out in the public interest or in the exercise of public powers conferred on the person responsible, in the terms provided for in article 6.1.e) of Regulation (EU) 2016/ 679, when it derives from a competence attributed by law."

Thus, the referral to the legitimate basis established in accordance with the internal law of the member states requires, in our case, in accordance with article 53 of the Spanish Constitution, that the rule of development, to be a right fundamental, have the status of law.

Law 19/2014, of December 29, on transparency, access to information and good governance establishes, in the second section of its first additional provision, that "access to public information in matters that have established a special access regime is regulated by their specific regulations and, additionally, by this law".

Therefore, in the case at hand, in which the access of the councilors to all the documents contained in the entry and exit register of the City Council is considered, the applicable access regime, for the purposes of granting or deny this access, is what results from the provisions established in the local regime legislation, fundamentally, Law 7/1985, of April 2, regulating the bases of the local regime (LRBRL) and Legislative Decree 2/ 2003, of April 28, by which the revised Text of the Municipal and Local Regime Law of Catalonia (TRLMRLC) is approved and, where applicable, in the municipal organic regulations, without prejudice to the fact that, in all that is not provided for in these regulations, Law 19/2014 applies additionally.

It should be noted that this Authority has had the opportunity to analyze in previous consultations the councilors' right of access to the information available to their corporation, necessary for the exercise of the functions that correspond to them, and which result from full application of the case that is now being examined (among others, in the opinions CNS 38/2010, CNS 13/2013, CNS 24/2015, CNS 80/2016, CNS 10/2017 available on the website www.apd.cat).

As can be seen from these opinions, and for the purposes that are of interest in this opinion, it is appropriate to agree that the recognition of the right of access to municipal information is for all members of the City Council, therefore, regardless of the fact that they are in the government team or in the opposition.

Thus, article 77.1 of the LRBRL establishes that "all members of the local Corporations have the right to obtain from the Mayor or President or the Government Commission any background, data or information held by the Corporation's services and resulting necessary for the development of its function. The request to exercise the right contained in the previous paragraph must be resolved motivatedly in the five natural days following the one in which it had been presented."

The TRLMRLC pronounces itself in the same sense by providing, in its article 164.1, that "all members of local corporations have the right to obtain (...) all the background, data or information held by the services of the corporation and are necessary for the development of its function."

Otherwise, it should be noted that the exercise of this right of access to municipal information is in any case subject to certain conditions provided for in the local legislation itself. Specifically, the mentioned article 164 of the TRLMRLC makes it clear that:

"2. The corporation's services must provide information directly to the members of the corporations when: a) They exercise delegated functions and the information refers to matters of their own responsibility. b) These are matters included in the agenda of the sessions of the collegiate bodies of which they are members. c) It is about access to information or documentation of the local corporation that is freely accessible to citizens.

3. In the other cases, the request for information is understood as accepted by administrative silence if a negative resolution is not issued within four days from the date of presentation of the request. In any case, the negative resolution must be motivated, and can only be based on the following assumptions: a) When the knowledge or dissemination of the information could violate the constitutional right to honor, personal or family privacy or the image itself. b) When it comes to matters affected by the general legislation on official secrets or summary secrecy."

Also, article 6, of the Municipal Organic Regulation of the City Council (ROM) establishes that "all councilors have the right, upon written request, to obtain from the mayor's office or deputy mayor of the corresponding area the access to all the antecedents, data and information that, being in the possession of the municipal services, are necessary to know for the normal deployment of the role of councilor, with the only limitations that derive from the deployment of article 106 of the Constitution."

It must be noted that from local regime legislation and from the jurisprudence of the Supreme Court it follows that councilors cannot be required to, in order to access municipal information, explain or justify the purpose of their request, since the reason for their request must be understood as implicit in the exercise of their functions as councilors, who are responsible for the control and supervision of the governing bodies of the corporation, as explained in article 22.2 a) of the LRBRL.

Now, interpreting the provisions of the local regime legislation and the jurisprudence of the Supreme Court, in connection with the RGPD (article 5.1.b)) and with the need to circumscribe the communication of data within the framework of a legitimate purpose, it could be convenient for the councilors, when making the request for access to information that contains personal data, to specify in relation to what purpose they are requesting this access and in what terms, in order to facilitate the weighting that the The City Council, as responsible (Article 4.7 RGPD), must assess the appropriateness of access to certain personal data, based on the aforementioned data minimization principle.

IV

For the purposes that concern us, it would be necessary to distinguish the information that may be contained in the City Council's Entry and Exit Register from the content of the documents themselves entered in this Register, which can be of very different nature. The query only refers to access to the City Council's document entry and exit register by any Councilor of the Corporation. Therefore, in this opinion we will only refer to access to the register of entries and exits of the Corporation's documents by councilors.

In accordance with article 16.1 of Law 39/2015, of October 1, on the common administrative procedure of public administrations (Law 39/2015), "the electronic registration of each Administration or body must guarantee the record, in each settlement that is made, of a number, descriptive heading of its nature, date and time of presentation, identification of the interested party, sending administrative body, if applicable, and person or administrative body to which it is sent , and, where appropriate, reference to the content of the document being registered" (...).

In the same sense, the Regulation on the organization, operation and legal regime of local entities, approved by Royal Decree 2568/1986, of November 28, applicable to the City Council in the absence of an organic regulation of its own that regulates it, in its article 153 provides that:

"1. The entries in the Registry will contain an exact reference to each of the documents that are sent from the local offices or that are received in them and, for the purpose of entry, the following points must be included:

a) Correlative order number. b)

Date of the document, with expression of the day, month and year. c) Date of entry of the document in the Registry

offices. d) Provenance of the document, with indication of the authority, corporation or person who signs it. e) Extract, review or brief reference of the matter included in the

body of the registered writing. f) Business, Section or department to which your knowledge corresponds. g) Resolution of the matter, date and authority that dictated it,

and

h) Observations for any annotation that may be appropriate in a given case. (...)"

Therefore, a prior analysis should be made in relation, among others, to the greater or lesser degree of concreteness with which the information is entered in the Register, for example, in relation to the use of more or less generic or descriptive typologies about the matter or reason for which a letter is submitted to the Registry, in order to facilitate subsequent weighting in the event of requests for access to information by councillors.

This is particularly relevant when the writings that enter the Register may lead to the processing of data of special categories, for the purposes of Article 9 of the RGPD, or cases related to criminal offences, allegations related to abuse, issues related to minors of age in a situation of violence or helplessness, issues related to people's health, etc.

For this reason, in order to facilitate the analysis, it could be convenient for the councilor to specify the terms of his request, for example, limiting the period of time in respect of which he requests access, the scope of action municipal that is of their interest (works and services, education, human resources, etc.) and/or the possible subjects affected, among other aspects. Otherwise, the possibility of facilitating access to the information in the Entry Register after dissociating the personal data could be particularly valued.

In this way, it would be possible to facilitate the exercise of the right of access to municipal information that the local regime legislation recognizes to the councilor and, at the same time, respect the fundamental right to the protection of personal data of those potentially affected.

In this sense, it is necessary to take into account the possible limitations to the right of access to certain personal data that may arise due to the application of the principles of the RGPD, in particular, the principle of data minimization (Article 5.1 c)), as is set out below.

v

In accordance with the aforementioned principle of data minimization (Article 5.1 c) RGPD), "personal data will be adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed."

This principle implies, on the one hand, that access to municipal information, which includes certain personal data, without the consent of those affected must necessarily be linked to the exercise of the functions that correspond in each case to the councilor of whatever it is, in the terms provided for in the local regime legislation, cited.

Thus, the processing of personal data that can be carried out by a councilor, who does not have attributed government responsibilities, as in the present case, finds its justification, from the perspective of data protection, in the exercise of the functions that is assigned as a member of collegiate bodies of the local entity itself and, in a special way, in control functions, such as the formulation of questions, interpellations, motions or even the motion of censure, which attributed to the local regulations.

Any other treatment that could be carried out based on the knowledge of personal data of the interested parties, and that was not justified in the exercise of their functions,

would imply, at the outset, a change of purpose that would require the consent of the person concerned or be protected by law.

On the other hand, the application of the principle of data minimization implies that the treatment of essential data to fulfill the purpose is justified. Therefore, it entails carrying out, in each specific case, a weighting exercise in order to assess the implications that, in each case, the exercise of the councillors' right of access to information may have for the rights of the people affected, such as the right to the protection of personal data (Article 18.4 EC).

In this case, the City Council must take into account when carrying out this weighting, among others, the circumstances of the specific case, the personal data contained in the requested documentation, the terms and the specifics with which the request is formulated or the possible subjects affected.

Given these considerations, the City Council, before giving councilors access to all the information contained in the Register of entry and exit of documents, must necessarily carry out a weighting of conflicting rights and interests.

This prevents us from being able to conclude, a priori, that the generalized and indiscriminate access of councilors to the information contained in the Register of entry and exit of documents would be appropriate.

VI

Finally, it should be remembered that whenever the councilors' access to personal data is carried out due to the functions entrusted to them as such, they must be governed, apart from the duty of reservation imposed by the local regulations (article 164.6 TRLMRLC), by the principle of purpose limitation (article 5.1.b)) and by the principle of integrity and confidentiality (article 5.1.f)) established in the RGPD.

Thus, article 164.6 of the TRLMRLC provides: "the members of the corporation must respect the confidentiality of the information to which they have access by virtue of their position if the fact of publishing it could harm the interests of the local entity or third parties."

Also, in accordance with the principle of purpose limitation (Article 5.1.b) RGPD), as seen, any use of personal information after access by councilors should be equally justified for a legitimate purpose. Otherwise, we could be faced with a treatment not adjusted to the RGPD, even though the access to personal data was initially considered legitimate.

In addition, this purpose in which the subsequent processing of personal data by councilors could be framed should not be incompatible with that which at the time would have justified the access, that is the exercise of the legally attributed functions .

For its part, in accordance with the principle of integrity and confidentiality (article 5.1.f)) "personal data will be treated in such a way as to guarantee adequate security of personal data, including protection against unauthorized treatment or illegal and against accidental loss, destruction or damage, through the application of appropriate technical or organizational measures."

Therefore, if the subsequent use of the information to which the councilor would have had access by reason of his position involved disclosing the personal data contained therein to third parties,

without the consent of the affected person or another legal basis that prevents it (article 6 RGPD), we could also find ourselves faced with an action not adjusted to the data protection regulations, even though the access was originally considered lawful .

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

Conclusions

The local regime legislation recognizes a right of access to councilors to information that may be necessary for the performance of their functions (Article 164 TRLMRLC), in relation to which it will be necessary to take into account the regulations for the protection of personal data when this information contains personal data.

The application of the principle of data minimization (Article 5.1 c) RGPD) requires, as far as possible, a weighting with respect to the personal data included in the set of information requested, especially if they are special categories of personal data (art. 9 RGPD), so that no more data is communicated than is strictly necessary to achieve the legitimate purpose that justifies the access, that is the development of the functions that correspond to councilors.

For the information available, in the specific case examined, providing councilors with access to the Register of entry and exit of documents could force this principle of data minimization and pose a risk to the proper protection of personal information of those affected, given the volume of information requested, the high number of possible people affected and the diverse nature of the personal information that could be contained, among which it would not be possible to rule out data from special categories, or which require special protection.

In any case, once the councilors have access to municipal information due to the legally entrusted functions, they must be governed by the duty of reservation imposed by the local regime regulations, by the principle of purpose limitation (article 5.1.b) RGPD) and the duty of integrity and confidentiality (Article 5.1.f) RGPD)

Barcelona, May 22, 2018