

CNS 42/2018

Opinion on the query made by a City Council regarding a local police officer's access to a copy of a reserved information file

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 the request for access to a copy of a reserved information file, that would have been formulated by a local Police official.

Specifically, the City Council formulates the following questions:

First: Does he have the status of an interested party in accordance with the criteria he states in the Repossession Appeal?

Second.- Would I have the right to obtain a copy of the entire reserved information file that is concluded and with the file result?

Third.- When exercising the right to a hearing (article 31 of Law 19/2014, of December 29, on transparency, access to public information and good governance), to the people who are affected by this file, must the person requesting a copy of the file be identified?

After analyzing the query, which is accompanied by a copy of the appeal submitted by the person requesting access to the file, and a copy of the reserved information file, and having seen the report of the Legal Counsel, a decision is made the next:

I

(...)

II

The inquiry states that a member of the Local Police requested information regarding requests to open a disciplinary file during the time when this person was performing the functions of accidental head of the local police, in the year 2015. The consultation adds that, in accordance with Law 19/2014, of December 29, 2014, on transparency, access to public information and good governance (hereafter, LTC), the requested information was given and was informed that confidential information had been carried out.

According to the inquiry, the applicant would have presented on June 8, 2018, an appeal for reinstatement to the mayor, in which he requests, among others, a copy "of the entire file of reserved information that was to conclude".

The consultation encloses a copy of said appeal, as well as a copy of the reserved information file that has been carried out.

In the reinstatement appeal, the applicant requests, among others: "Given that the non-existence of disciplinary responsibility was determined and no irregularity was detected, I request a complete copy, with the elimination of the corresponding data that may affect the data protection law, of the reserved information file that was initiated."

At the outset, we agree that it is not up to this Authority to resolve the various issues raised by the person in the appeal addressed to the mayor, on June 8, 2018, the resolution of which corresponds to the mayor.

According to the applicant, the right of access to pending files will be governed by administrative procedure legislation, so the provisions of Law 39/2015, of October 1, on the Common Administrative Procedure must be taken into account of Public Administrations (LPAC), in particular, article 4 (FJ first of the appeal for replacement):

"1. The following are considered interested in the administrative procedure: a) Those who promote it as holders of individual or collective legitimate rights or interests. b) Those who, without having initiated the procedure, have rights that may be affected by the decision that is adopted therein. c) Those whose legitimate interests, individual or collective, may be affected by the resolution and who appear in the procedure until a definitive resolution has been reached."

Certainly, as this Authority has agreed (among others, in Report IAI 27/2017), the first additional provision, app. 1, of the LTC, provides that "The access of the interested parties to the documents of the administrative procedures **in progress** is governed by what is determined by the legislation on the legal system and administrative procedure."

Thus, article 53.1.a) of the LPAC, provides that those interested in an administrative procedure have, among others, the right:

"a) To know, at any time, the status of the processing of the procedures in which they have the status of interested parties; the meaning of the corresponding administrative silence, in case the Administration does not dictate or notify an express resolution within the deadline; the competent body for its instruction, if applicable, and the resolution; and the procedural acts dictated. Likewise, they also have the right to access and obtain a copy of the documents contained in the aforementioned procedures. (...)."

The recognition of this right to access a file of an administrative procedure based on article 53.1.a) LPAC, refers to open administrative procedures or that are being substantiated at the time of requesting access to the information, and is conditioned on the fact that the person who wants to access it has the status of interested party.

However, due to the information available, **the reserved information file has concluded with the archive of the actions.**

According to the provisions of article 275 of Decree 214/1990, of July 30, which approves the Regulation of personnel in the service of local entities:

"The competent body for the initiation of disciplinary proceedings is the president of the corporation or the member thereof who, by delegation, exercises direct command of the staff, and has the following attributions:

a) Order, in advance, the realization of reserved information.

b) Agree on the initiation of the file and appoint its instructor.

(...)."

Also, according to article 26.1 of the Regulation of the procedure of the disciplinary regime applicable to the local police forces of Catalonia (approved by Decree 179/2015, of August 4):

"26.1 If the instructor, at any stage of the procedure, deduces the non-existence of disciplinary responsibility or adequate evidence to substantiate it, he will propose with reasons the postponement and filing of the actions, so that the body competent to sanction resolves what consider appropriate."

According to the information available, the Local Government Board would have agreed, unanimously, on May 11, 2016: "Declare the archive of the reserved information procedure started on February 19, 2016 to the agent (...) according to the report presented by the instructor, from which it is clear that there is no disciplinary responsibility in relation to the facts exposed."

As the jurisprudence has shown in relation to the information proceedings prior to the initiation of the disciplinary procedure: "(...) the act that puts an end to said proceedings only has a definitive character, making the continuation of the procedure impossible, cuando acuerda el sobreseimiento, but not when it resolves to initiate the disciplinary procedure" (Sixth FJ, STS of May 5, 1998).

Therefore, the case in question refers to a closed procedure, so that it would not be appropriate to apply the provisions of the administrative procedure regulations (art. 4 and art. 53.1.a) LPAC), regarding the attribution of the status of interested party of the applicant in the reserved information file.

In any case, it must be borne in mind that, as the jurisprudence had made clear, the mere status of complainant does not entail the recognition of the status of interested person (art. 62.5 LPAC). Therefore, this legitimacy is not recognized to contest administratively or litigiously the archive decision, as repeatedly indicated by the jurisprudence of the Supreme Court (the STS of November 25, 2013 serves for all purposes).

According to the jurisprudence, a complainant does not have the status of an interested person for the purposes of demanding the imposition of a specific disciplinary sanction, since the punitive power belongs solely to the Administration entrusted with the corresponding sanctioning power and, consequently, only the Administration has an interest protected by the legal system in which the offender is sanctioned ((among others, STS of February 15, 2005 (rec. 1721/2002), STS of March 9, 2005 (rec. 504/2001), STS of October 9, 2007 (rec. 92/2004) or STS of March 24, 2014 (rec. 3576/2011)).

For all of this, for the purposes of interest, in response to the first question posed, it can be considered that the applicant would not have the status of an interested party in the terms of the administrative procedure regulations, as alleged in the appeal for reinstatement presented, in relation to a procedure that is closed.

Having said that, according to article 13.d) LPAC, people who have the capacity to act before public administrations (art. 3 LPAC), are holders of the right "To access public information, files and records, in accordance with the provisions of Law 13/1993, of December 9, on transparency, access to information and good governance, and the rest of the legal system."

Therefore, the request for access to information, in the case at hand, will have to be resolved based on the provisions of the transparency regulations and the possibility of accessing the requested file will have to be analyzed, no longer as an interested party based on the provisions of the administrative procedure regulations, but as a citizen, by virtue of the right of access to public information recognized in the transparency legislation.

III

The LTC establishes in article 18.1 that "people have the right to access public information" (art. 2.b) LTC), either individually or in the name and representation of any legally constituted legal person. 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".

As this Authority has agreed, among others, in Opinion CNS 14/2018, the information that may be contained in a file of reserved information, 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 et seq. of the LTC, the right of access to public information may be denied or restricted for the reasons expressly established in the laws.

The reserved information phase, prior to the opening, if applicable, of a sanctioning or disciplinary procedure, is opened with the aim of investigating certain 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 concurrent relevant circumstances, has the character of reserved, as established in article 275 of Decree 214/1990, cited.

Regarding the nature of the reserved information procedure, according to STS 21/2018, of February 15 (FJ third): "(...) **It is an inquisitive investigation in which witnesses are incorporated and which precisely tends to offer indicative arguments for the resolutions of the Disciplinary Authority**, or to establish presuppositions for the subsequent instruction, by means of an approach to the alleged set of facts. It is not an incriminating phase in any sense and its contents and conclusions will have to be the subject of the evidentiary proceedings that the Instructor practices with full guarantees of contradiction (...)."

The reserved information does not properly constitute an administrative procedure and the reserved nature of these investigative actions (knowledge of which may entail a clear detriment to the outcome of the same), prevents access to be facilitated during its processing the documentation contained in the file. This even affects the person being investigated (on this, we refer, among others, to STSJC 1212/2005, of November 25 (FJ second)).

With more reason, this limitation of access must affect other people, including the person making the complaint or the person who has been able to urge or request the opening of the file to the competent body (in the case at hand, the accidental head of the police force, at the time of the events).

As has been pointed out, in the case we are dealing with, proceedings have been archived, so that, initially, the limit provided for access would not apply, for the protection of the investigation or sanction of the facts (art. 21.1.b) LTC). Therefore, it will be necessary to analyze whether any other limitations of those established in articles 20 et seq. of the LTC or in any other law apply.

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 testify as witnesses to the facts that are investigated.

According to the available information, the reserved information file contains, among others, information about the traffic accident that caused the events; various duties carried out by the instructor; various testimonial statements from members of the local police force (including, among others, the officer affected by the withheld information, as well as the accidental head of the force who, according to the available information, would have presented the mayor with the proposal to 'initiation of disciplinary proceedings on August 13, 2015); copy of a medical notice of discharge, as well as the Confidential Information Resolution signed by the instructor on April 10, 2016; or the filing proposal signed by the mayor and the filing agreement of the Local Government Board.

The first thing that needs to be recognized is the applicant's right of access to the personal data relating to him that may be included in the file documentation.

Article 24.3 of the 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."

Article 15 of Regulation (EU) 2016/679, of April 27, general data protection (hereinafter, RGPD), in relation to the right of access to personal data, determines the following:

*"1. The interested party will have the right to obtain from the controller confirmation of whether or not personal data concerning him or her are being processed and, in such case, **the right to access personal data** and the following information:*

a) the purposes of the treatment; b) the categories of personal data in question; c) the recipients or the categories of recipients (...). d) if possible, the expected period of personal data conservation or, if not possible, the criteria used to determine this period; e) the existence of the right to request from the person in charge the rectification or suppression of personal data or the limitation of the treatment of personal data relating to the interested party, or to oppose said treatment; f) the right to present a claim before a control authority; g) when the personal data has not been obtained from the interested party, any available information about its origin;

(...).

3. The person responsible for the treatment will provide a copy of the personal data subject to treatment. (...).

*4. The right to obtain a copy mentioned in section 3 **will not negatively affect the rights and freedoms of others.**"*

In the case at hand, it is clear that the applicant must have access to his own declaration, contained in the reserved information file and, if applicable, to other data that may be contained in said file about the his person

It should be pointed out that, in principle, if we stick to the configuration of the right of access (art. 15.1.g) RGPD), if the source of the information is in the statement of another natural person (other members of the local police force who have declared in the reserved information), the applicant could have access not only to the facts related by that person that refers to him, but also, even, to his identity, without prejudice to the possibility that this third person exercises his right of opposition in this respect (art. 21 RGPD). Thus, by way of example, there are references to the applicant in several statements of other witnesses.

In any case, the provision of article 15.4 RGPD could imply a limitation to access to information that, on the applicant himself, other witnesses have given in their respective statements, in the event that the affected third parties exercise the your right to object to the information being communicated to you.

On the other hand, it is necessary to refer to the information relating to the people who have intervened in the processing of the reserved information, due to their status as personnel in the service of the public administration, as would be the case of the instructing person or those that agree on the start or filing of prior information, article 24.1 LTC, provides the following:

"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."

Therefore, the name and surname of the person investigating the case, whose intervention is a consequence of the Administration's operation, can be communicated to the applicant. Equally, with regard to the people who decide on the opening and, in the case at hand, the filing of the file, given that their identification would correspond to the functions attributed in the regulations by reason of the position.

Beyond this, regarding the rest of the data of third parties, the criteria established in articles 23 and 24.2 LTC must be taken into account.

IV

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, of December 9, on transparency, access to public information and good governance (LT), establishes that: "(...) If the information includes data especially protected to those 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 is only may authorize if it has the express consent of the person concerned or if the latter is covered by a law with the rank of law."

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 offense or punishable offense in disciplinary matters, information that is deserving of special protection.

As this Authority has highlighted, there are cases in which the actions resulting from the investigations do not prove that the facts investigated may constitute an infringement. It cannot be ruled out that, even in a case that has been filed, such as the one at hand, new statements or new facts may lead to the opening of a new sanctioning procedure.

Even if the decreed archive is maintained, it must be borne in mind that the mere fact of providing information about a person who has been investigated for facts that could be constitutive

of a disciplinary offence, could cause serious damage to the privacy of the person affected (the agent under investigation), 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.

In the case at hand, obviously, the applicant already knows the identity of the agent under investigation. However, beyond this identification data, the file may contain other sensitive information about the investigated agent, information that can be derived from the latter's own statement, or from the statements made by third parties at the request of the instructor. In any case, the consideration regarding the special nature of the information referring to disciplinary violations (art. 23 LTC), would lead to limiting the applicant's access to the information about the investigated agent, included in the file of 'prior information. In the event that the reserved information file contains other data of the agent deserving of special protection (art. 9 RGPD), such as health data, it would be necessary to extend this consideration and therefore limit the access

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Having said that, with respect to access to information from third parties that may be contained in these files (specifically, the various witnesses questioned by the instructor), a prior weighting will need to be done between the various rights and interests at stake, all of 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 the case, and in this sense it is relevant when assessing the different rights and interests at stake, the position of the person requesting access may be decisive in the 'time to solve the eventual access to the personal data of third parties.

It is also necessary to take into account whether the applicant has provided an explicit purpose for access. It is certainly not mandatory to include in the request the reasons for which access is requested (art. 18.2 and art. 26.2 LTC), but in the event that the purpose pursued is not included, this element cannot be taken into account when making the weighting imposed by article 24.2 of Law 19/2014.

Finally, it will be necessary to assess the possibility of providing the information anonymously, in the specific case. This would be the first measure that should be taken if the purpose pursued

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

It should be noted in this regard that the principle of data minimization (Article 5.1.c) RGPD) requires that any data processing that is carried out (such as data communication or access) is limited to the minimum data necessary to achieve the intended purpose with this treatment.

Before that, however, it should be remembered that the specific regulations of the procedure provide that the initiation of the disciplinary procedure that is opened is communicated to the reporting person (art. 64.1 LPAC). According to article 13.2 of the Regulation of the procedure of the disciplinary system applicable to the local police forces of Catalonia: "If the procedure is initiated as a result of a complaint or a reasoned request, the competent body must communicate this agreement to the complainant or to the signatories of the reasoned request. Likewise, **the refusal to initiate disciplinary proceedings must be communicated.**"

Thus, the regulations enable the requesting person to be notified that the file has been closed and that no disciplinary proceedings have been initiated. However, this provision would not entitle the applicant to access a copy of the Mayor's Reserved Information Resolution Proposal, nor a copy of the Local Government Board's Archive Agreement, included in the 'file, since these documents may include information that would go beyond the mere confirmation that the file is not initiated and, therefore, what the aforementioned regulation provides for communication (art. 13.2 of the aforementioned Regulation).

Having said that, for the purposes of the weighting required (art. 24.2 LTC), it must be taken into account that the person requesting access was, at the time of the events, the accidental head of the local police station, but that is unknown what employment position would the claimant have at the time of issuing this opinion (or the one he could have at the time of giving him access to the information), not only in relation to the investigated agent, but also to the other workers that they testified in the course of the previous information. Therefore, it is unknown whether in the current circumstances the applicant continues to carry out tasks that could justify his knowledge of the personal information contained in the file, both of the investigated agent and of the witnesses.

As this Authority has agreed (among others, in Opinion CNS 67/2016), with regard to the people who have intervened in the file as witnesses, it does not seem that their right to data protection has to sacrifice oneself in the face of the access request of a person who does not explain - at least, according to the information available -, what is the purpose he pursues with his right of access. If we stick to the information available, specifically, the appeal for replacement presented by the applicant, beyond stating his status as an interested party, the applicant does not specify the reason for the request for access, an element that could be decisive for the weighting of article 24.2 LTC, as has been said.

Although it could be inferred, from the context of the case, a certain interest on the part of the complainant (due to his status as accidental head of the police station at the time of the events) in knowing the circumstances of the archive of reserved information, this does not seem that it may be sufficient to justify a sacrifice of the right of third parties (witnesses in the procedure, apart from the investigated agent himself). Even more so, taking into account that, as has been pointed out, the employment relationship, if any, of subordination, which could exist at the time of issuing this opinion, between the witnesses and the investigated agent, of a on the one hand, and the applicant, on the other. In short, for the purposes of weighting, it is not clear that, depending on the current employment situation of all those involved (both the applicant and the rest of the staff who gave a statement), the knowledge of the witness and other members of the body on the part of the applicant, is necessary in relation to a purpose that, as has been said, the applicant himself does not specify.

These considerations are extended in relation to the entire content of the reserved information file, among others, the Instructor's Resolution, dated April 10, 2016, which includes, in greater or lesser detail, the statements of the various witnesses, as well as other considerations and evaluations, based on which the instructor proposes the archive of the reserved information.

In this sense, the instructor's report refers extensively, and in considerable detail, to the statements of the various witnesses, to argue the archive decision. Therefore, in the case of giving the applicant access to the instructor's report, the same sacrifice of the right of affected third parties would occur as giving access to the full statements. Consequently, taking into account, once again, that the applicant does not specify a purpose of the access that can be assessed for the purposes of weighting, it would also not be relevant to give him access to said instructor's report.

Having said that, it should be noted that the transparency regulations enable the possibility of giving access to information about third parties, with the prior dissociation of personal data. In the case at hand, given the direct involvement in the events of the applicant, as well as of the investigated officer and the rest of the police force who were witnesses to the reserved information, it seems clear that there would be a real possibility, on the part of the applicant, to re-identify the affected persons without disproportionate efforts, in relation to the declarations of each one, in case of giving him access to the file.

Due to the circumstances of the case (the number of witnesses, the fact that they all belong to the local police force and that they provided services at the same police station, and that the complainant is part of it and knows the functions of each witness and their position in the 'organization chart, etc.), a "reasonable probability" of identification of those affected by the applicant cannot be ruled out, in the terms of Recital 26 of the RGPD, according to which:

"The principles of data protection must be applied to all information relating to an identified or identifiable natural person. Pseudonymized personal data, which could be attributed to a natural person through the use of additional information, must be considered information about an identifiable natural person. To determine whether a natural person is identifiable, all means, such as identification, that can reasonably be used by the data controller or any other person to directly or indirectly identify the natural person must be taken into account. To determine if there is a reasonable probability that means will be used to identify a person

physics, all the objective factors must be taken into account, such as the costs and the time required for identification, taking into account both the technology available at the time of treatment and technological advances. (...)."

It seems, therefore, a priori, and in view of the available information, that anonymization would not be a viable mechanism, in the case at hand, to provide access to the complete file.

In any case, in the event that the affected persons can consent to access to the information without dissociation, if they so wish (a possibility that cannot be ruled out), it would be necessary to carry out the procedure of hearing the affected persons who are provided for in article 31 of the LTC.

VI

Finally, the third issue is raised in relation to the hearing procedure for the affected persons (article 31 LTC), specifically, whether the person requesting access must be identified, in this case, to the reserved information file.

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, to which we have referred to (art. 21 RGD).

According to 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."

We agree that, according to the same article 31 LTC:

"3. The transfer of the request must indicate the reasons for the request, if they have been expressed, but **it is not mandatory to reveal the identity of the requester**.

4. The applicant must be informed of the transfer of the application to third parties and of the suspension of the deadline for issuing a resolution until the allegations have been received or the deadline for presenting them."

However, the fact that the regulations do not require the identity of the applicant to be disclosed does not prevent it from being appropriate in certain cases, in consideration of the rights and interests of the persons affected.

In the case we are dealing with, although the City Council would not be obliged to communicate the identity of the person requesting access to information, to the people to whom it gives a hearing procedure (art. 31.3 LTC), given the context of the employment relationship between the affected persons and the applicant (which, in some cases, could be of subordination, as has been said), it would be advisable to transfer the access request with indication of the applicant's identity.

In accordance with the considerations made in this opinion in relation to the query raised, the following are made,

Conclusions

Question 1: The person requesting the reserved information file would not have the status of an interested person in the terms provided for in the administrative procedure regulations (art. 4 and art. 53.1.a) LPAC), given that the 'previous information file has concluded with the archive of actions.

Question 2: The City Council could only inform the complainant about the fact that the file has been archived. Beyond that, by application of the limitations provided for in articles 23 LTC and 24 LTC, access to the reserved information file should be denied, unless the affected persons give their consent.

Question 3: Although in principle it is not obligatory to communicate the identity of the applicant to those persons to whom the City Council gives hearing procedures (art. 31.3 LTC), given the context of the employment relationship between the persons affected and the applicant, it would be convenient to transfer the access request indicating the identity of the applicant.

Barcelona, July 25, 2018