

Opinion in relation to the consultation of a city council on access to a list of people who have had access to an activity license file requested by the person who is its holder

A letter from a city council is presented to the Catalan Data Protection Authority in which it is considered whether it is possible to provide the holder of an activity license with the identification of the people who have had access to the file corresponding to the said license.

A copy of the application submitted by the holder of the activity license is attached to the consultation letter.

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

I

(...)

II

The City Council states, in its letter of inquiry, that the person holding a dance hall activity license has requested to know the identification of the people who have had access to the file relating to this license.

Specifically, in accordance with the application submitted, a copy of which is attached, this person requests that a certificate be issued stating:

- The identity, department and council to which the responsible person is attached of the custody of the file.**
- The history of the people who have consulted, obtained copies or had access by any means to the file.**

The City Council points out that the neighbors of the dance hall in question would be affected by this request, given that they consulted the file as a result of a dispute they have with the license holder.

In addition to all of this, it specifically raises the question of whether it is possible to provide the holder of the activity license with the identification of private individuals, not employees, who have had access to the file.

This issue is examined in the following sections of this opinion.

III

From the documentation accompanying the inquiry it seems to be inferred that the person requesting information on the identity of the persons who have accessed the activity license file would be, in the present case, a person physics, which, as it turns out, would act in its own name.

Based on this premise, it is necessary to take into account the possibility that the request for this information is framed in the exercise of the right of access of the interested party or the affected person (the natural person who owns the personal data subjected to treatment) provided for in the data protection legislation.

As recognized by the Constitutional Court in STC 292/2000, all citizens have the right to access their personal information held by third parties, as part of their right to informational self-determination (FJ 5):

"The guarantee of the private life of the person and his reputation today have a positive dimension that exceeds the scope of the fundamental right to privacy (art. 18.1 EC), and that translates into a right of control over the relative data to the person himself. The so-called "informatics freedom" is thus the right to control the use of the same data inserted in a computer program (habeas data) and includes, among other aspects, the citizen's opposition to certain personal data being used for purposes other than those legitimate that justified its obtaining (SSTC 11/1998, FJ 5, 94/1998, FJ 4)."

The European Court of Human Rights has also expressed itself repeatedly in this sense, for example in the Judgment of March 26, 1987 (Leander case), that of July 7, 1989 (Gaskin case) or the Judgment of September 24 of 2002 (case MG vs. United Kingdom).

Article 15 of Regulation (EU) 2016/679, of the Parliament and of the European Council, of 27 April 2016, General Data Protection Regulation (hereinafter, RGPD), regulates this right of access in the following terms:

"1. The interested party will have the right to obtain from the person in charge of the treatment confirmation of whether or not personal data that concern them are being processed and, in such case, the right to access the 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 to whom the personal data was communicated or will be communicated, in particular recipients in third parties or international organizations; 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; h) the existence of automated decisions, including profiling, referred to in article 22, sections 1 and 4, and, at least in such cases, significant information about the logic applied, as well as the importance and expected consequences of said treatment for the interested party.
2. (...)

3. The person responsible for the treatment will provide a copy of the personal data subject to treatment. The person in charge may charge a reasonable fee based on administrative costs for any other copy requested by the interested party. When the interested party presents the request by electronic means, and unless he requests that it be provided in another way, the information will be provided in a commonly used electronic format.

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

This precept recognizes the right of the affected or interested person (in this case, the natural person holding the activity license) to request and obtain from the data controller (the City Council) a copy of their personal data personnel subjected to treatment (in this case, as a result of the processing of the activity license file promoted by itself), including certain information about this treatment, such as, for the purposes of interest, the recipients to whom these data have been communicated or are expected to be communicated.

Article 4.9) of the RGPD defines as recipient “the natural or legal person, public authority, service or other body to which personal data is communicated, whether or not it is a third party. (...)”.

The City Council maintains that the residents of the establishment where the authorized activity is carried out (ballroom) have accessed the license file following a dispute with its owner. It is not sufficiently clear, from the information provided, whether these neighbors are natural persons who have accessed the file in a personal capacity or one or several communities of owners. In any case, to the extent that, as a result of this access, they have been provided with personal information of the natural person holding the license, they must be considered, from the point of view of data protection, recipients of said personal information. That being the case, the natural person holding the license, exercising his right of access (Article 15 RGPD), would have the right to know the identity of these recipients or the category of recipients (section 1

This identification, dealing with natural persons and by application of the principle of data minimization, which requires that personal data be adequate, relevant and limited to what is necessary to achieve the purpose for which they are processed (Article 5.1.c) RGPD), should include only the first and last names of these people.

Point out, however, that the interested party's right of access would not include the communication of the identity of the specific persons who, as personnel of the data controller (in this case, of the City Council), may have had access to the data of the interested person (the holder of the activity license) by reason of his position or duties. In this case, and in view of the GDPR's definition of the term "recipients" (article 4.9), it could be understood as sufficient to provide the interested party with the municipality, service or area of the City Council that have participated in the processing of the activity license file.

IV

Having said that, it must be noted that in the event that the person requesting information on the identity of the persons who have accessed the license file was acting on behalf of a legal entity, this being the license holder , the provisions examined regarding the right of access of the interested party would not apply.

Article 15 of the RGPD, previously transcribed, configures the right of access as a very personal right that must be exercised by the interested party himself (or through a representative), understood as the "identified or identifiable natural person" (article 4.1) RGPD) whose personal data are the subject of treatment (Article 4.2) RGPD).

Therefore, legal entities cannot be holders of this right of access nor of the rest of the rights of informative self-determination: rights of rectification, deletion, opposition, limitation of treatment, portability of the data and not be the subject of automated individual decisions (articles 16 to 22 RGPD).

This has been recognized by the Supreme Court in, among others, its judgment of November 24, 2014 (appeal no. 3763/2013), in which it is clear (FJ 2) that "(...) we are faced with a right fundamental, the protection of personal data, which differs from those guaranteed in art. 18.1 of the Constitution, and of which only natural persons, that is, human beings, are entitled, as recognized both in the LOPD and in the aforementioned Directive 95/46, as well as in the International Conventions signed by Spain previously referred to."

Having made this clarification, it is considered pertinent to examine, next, whether there is another way other than the exercise of the right of access of the interested party (article 15 RGD) that allows the holder of the activity license to be provided (either natural person or legal person) the personal information you request.

v

Article 5.1.a) of the RGD establishes that all processing of personal data (article 4.2)), such as communication to the license holder of the identity of the persons who have had access to the file, must be lawful, loyal and transparent in relation to the interested party (principle of lawfulness, loyalty and transparency).

In this sense, article 6 of the RGD establishes that there must be a legal basis that legitimizes the treatment, either the consent of the affected person (section 1.a)), or any of the other legitimizing bases that it provides, for example, that "the treatment is necessary for the fulfillment of a legal obligation applicable to the person responsible for the treatment (section 1.c)) or 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 person responsible for the treatment" (section 1.e)).

As can be seen from article 6.3 of the RGD and expressly included in article 8 of the LOPDGDD, data processing can only be considered based on these legal bases of article 6.1. c) and e) of the RGD when so established by a rule with the rank of law.

At the same time, article 86 of the RGD provides that "the personal data of official documents in the possession of any public authority or public body or a private entity for the performance of a mission in the public interest may be communicated by said authority, body or entity in accordance with the Law of the Union or of the Member States that applies to them in order to reconcile public access to official documents with the right to the protection of personal data under this Regulation."

Given this, mention should be made of Law 19/2014, of December 29, on transparency, access to public information and good governance (hereafter, LTC), which aims, among others, to "regulate and guarantee people's right of access to public information and documentation" (article 1.1.b)).

In this sense, article 18 of the LTC establishes that "people have the right to access public information, referred to in article 2.b, individually or in the name and representation of any person legally constituted legal entity" (section 1).

Article 2.b) of the LTC 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 that supplied by the other obliged subjects in accordance with the provisions of this law".

In the present case, the information requested would be related to an activity license file in the possession of the City Council which, by the reference indicated in the request provided in the consultation, seems to have been processed during the year 2008.

It is, therefore, public information for the purposes of the LTC and would remain subject to the access regime provided for in this regulation, which establishes, as a general criterion, that the right of access to public information can only be denied or restricted for the reasons expressly established by law (article 20 et seq.).

In this sense, and in the case of information that includes personal data that is not considered data deserving of special protection (Article 9 RGPD), access should be governed by the provisions of Article 24 of the LTC.

Thus, it must be borne in mind that, in accordance with article 24.1 of the LTC, "access to public information must be given if it is information directly related to the organization, operation or activity public information of the Administration that contains merely identifying personal data, unless, exceptionally, in the specific case the protection of personal data or other constitutionally protected rights must prevail".

In this case, the merely identifying data (name, surname and position) of the public employees who have intervened in the exercise of their duties would be included in the activity license file, unless there were some exceptional circumstances for the affected person (for example, being in a situation of special vulnerability). Make it clear that any other personal information provided in this regard would be excessive for the purpose that justifies the access and should be omitted.

With regard to access to personal data of other people - as could be the case of the residents expressly mentioned by the City Council in its consultation - article 24.2 of the LTC will be applicable, which establishes that :

"2. If it is other information that contains personal data not included in article 23, access to the 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."

In relation to this weighting, it should be borne in mind that, based on the information available, in the present case the person who requested the information on the identity of the persons who have accessed the activity license file would hold the status of an interested person, as it is, according to the City Council's statements, the holder of said license.

This fact is relevant, given that this position could justify, in this case, a different treatment, with regard to the possibility of accessing said information, to what could correspond if it were a third party outside the aforementioned file

Likewise, the purpose that motivates the request for the information should be taken into consideration. Although, in accordance with article 18.2 of the LTC, the exercise of the right of access is not subject to motivation, the fact that the applicant expresses what is the purpose he pursues and ultimately the reasons for which is interested in knowing the information adds a very important

to a weighting criterion between the public interest in the disclosure of the information and the right of the affected persons.

Point out, in this regard, that the right of access to public information can legitimately respond to particular interests. Regarding this, article 22.1 of the LTC, in demanding that the limits applied to the right of access to public information be proportional to the object and purpose of protection, mentions the taking into consideration, in the application of these limits, of "the circumstances of each specific case, especially the concurrence of a superior public or private interest that justifies access to the information."

For its part, State Law 19/2013, of December 9, on transparency, access to public information and good governance, mentions taking into consideration the fact that the applicant justifies their request for information in the exercise of a right (article 15.3.b)).

In the consultation letter, the City Council mentions the existence of a dispute between the person holding the activity license and the neighbors of the establishment where such activity is carried out, without further details. In view of these manifestations, it could not be ruled out that, in the present case, the intended purpose of the information request was related to the right of defense of the person interested in the file.

From what can be inferred from the documentation provided, it seems that it is only of interest to the person requesting to know the identity of these people (the neighbors), that is to say, their first and last names. Information that, in the context referred to in the query, could be relevant.

For all that and in view of the information available, it does not appear that, in the present case, there are reasons that justify a limitation of the license holder's right of access to the information requested in relation to activity license file promoted by himself. This, except for the existence of some personal circumstance that makes it advisable to limit access to said information, an aspect that is unknown.

It should be remembered, at this point, that article 31 of the LTC establishes that if the request for public information may affect the rights or interests of third parties, identified or easily identifiable, they must be transferred from the sole request, so that they can make the allegations they consider appropriate, in those cases in which they can be determined about the meaning of the resolution. This procedure is essential so that the affected persons have the possibility to state if they consent to access to the information or if there is any element that, depending on the personal situation of the affected person, in their opinion should involve a limitation

It is up to the City Council to carry out this hearing process for those affected prior to the resolution of the license holder's request for access.

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

Conclusions

The exercise of the interested party's right of access would allow the natural person holding an activity license to know the identity of the third parties who have had access to the file corresponding to said license, insofar as , as a result of this access, personal data of the interested party have been communicated to them (Article 15.1.c) RGPD).

Article 24 of the LTC would legitimize the access of the holder of the activity license to the merely identifying data of the public employees who have intervened in the exercise of their functions in the processing of the file corresponding to said license (section 1), as well as the identity of the third parties who have had access to this file (section 2), unless the concurrence of some exceptional circumstance in the affected persons that could justify limiting their access is proven .

Barcelona, January 11, 2019

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