

Ref.: IAI 2/2018

## **Claim: 481/2017**

**Legal report issued at the request of the Commission for the Guarantee of the Right of Access to Public Information in relation to the claim presented by a councilor against the City Council for the denial of access to information on the recruitment of staff at an Institute Municipal during the years 1996, 1997 and 1998.**

The Guarantee Commission for the Right of Access to Public Information (GAIP) asks the Catalan Data Protection Authority (APDCAT) to issue a report on claim 481/2017 submitted by a councilor against a City Council in relation to the denial of access to information on staff recruitment of a Municipal Institute during the years 1996, 1997 and 1998.

Having analyzed the request, which is accompanied by a copy of the administrative file processed before the GAIP, and in accordance with the report of the Legal Counsel, I issue the following report:

### **Background**

1. On August 28, 2017, a councilor presented the City Council (...), in the name and representation of a municipal group, a request in which he asked to have a copy of the formalized staff contracts by the Municipal Sports Institute (IME), as well as the respective recruitment files processed during the years 1996, 1997 and 1998 (up to and including July).
2. On November 22, 2017, the councilor submitted a second letter claiming that after the five-day period provided for in article 77 of the LBRL and 14.2 of Royal Decree 2568/1986, of November 28, by which the Regulation of Organization, Functioning and Legal Regime of Local Entities is approved, without issuing a negative resolution, your request must be understood to be regarded as administrative silence, and you have not yet received the requested documentation.
3. On November 24, 2017, the councilor filed a complaint with the GAIP, in which he explained that on August 28, 2017 he asked the City Council for documentation to carry out his task and that due to the lack of response from the corporation, the request must be understood to be regarded as administrative silence.
4. On January 9, 2018, the GAIP requests this Authority to issue a report in relation to the claim presented.

### **Legal Foundations**

## I

In accordance with article 1 of Law 32/2010, of October 1, of the Catalan Data Protection Authority, the APDCAT is the independent body whose purpose is to guarantee, in the field of the competences of the Generalitat, the rights to the protection of personal data and access to the information linked to it.

Article 42.8 of Law 19/2014, of December 29, on transparency, access to public information and good governance, which regulates the claim against resolutions on access to public information, establishes that if the refusal has been based on the protection of personal data, the Commission must issue a report to the Catalan Data Protection Authority, which must be issued within fifteen days.

For this reason, this report is issued exclusively with regard to the assessment of the incidence that the requested access may have with respect to the personal information of the persons affected, understood as any numerical, alphabetical, graphic, photographic, acoustic information or of any other type relating to physical persons identified or identifiable without disproportionate efforts (arts. 5.1.f) and 5.1.o) of the Regulations for the deployment of the LOPD, (RLOPD), approved by R. decree 1720/2007, of December 21). Therefore, any other limit or aspect that does not affect the personal data included in the requested information is outside the scope of this report.

The deadline for issuing this report may lead to an extension of the deadline to resolve the claim, if so agreed by the GAIP and all parties are notified before the deadline to resolve ends.

Consequently, this report is issued based on the aforementioned provisions of Law 32/2010, of October 1, of the Catalan Data Protection Authority and Law 19/2014, of December 29, of transparency, access to public information and good governance.

In accordance with article 17.2 of Law 32/2010, this report will be published on the Authority's website once the interested parties have been notified, with the prior anonymization of personal data.

## II

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."

The person requesting the information has the status of councilor of the City Council, which means that the provisions established by the local regime legislation are applicable, fundamentally, Law 7/1985, of April 2, regulating the bases of the local regime (LRBRL) and Legislative Decree 2/2003, of April 28, which approves the revised Text of the Municipal and Local Regime Law of Catalonia (TRLMRLC), as regards to councillors' access to municipal information.

This without prejudice to the fact that the councilor requesting information must be granted at least the same guarantees regarding access to information as the rest of citizens who do not have this condition of elected office, given the supplementary application of Law 19/2014 (additional provision first section 2).

As this Authority has ruled on previous occasions (among others, the opinions CNS 66/2016, 45/2016, 21/2016, 59/2015, 50/2015, 66/2016, 81/2016 which can be consulted at web [www.apd.cat](http://www.apd.cat)), the legal system recognizes a right of access to municipal councilors to information available to their corporation that may be necessary for the performance of their functions.

The access to personal information raised in this case must be examined from the perspective of the right of access that the regulations attribute to councilors, with respect to that information available to the City Council that is necessary for compliance of their functions.

Article 77 of the LRBRL establishes that "all members of 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 that are necessary for the development of its function. The request to exercise the right contained in the previous paragraph must be resolved motivatedly within 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."

From these precepts it follows that the right of access to information corresponds to councillors, and not to the municipal group. It must be said, however, that despite the fact that the request is made in the name and representation of a municipal group, it is signed by a councillor, who could request the information directly as such. We will therefore start from the consideration that the request for information must be signed by one or more councilors, in a personal capacity, and the councilors themselves who sign the request will also be responsible for the appropriate treatment of the information to which they have access. It should also be remembered that the recognition of the right of access to information is for all members of the local Corporation, regardless of the fact that they are in the government team or in the opposition, as this Authority has done in the past on previous occasions.

The right to obtain all the antecedents, data or information that are in the possession of the services of the local corporation and necessary for the exercise of their functions, in accordance with repeated jurisprudence on this issue (SSTS September 27, 2002, June 15, 2009, among others), is part of the fundamental right to political participation enshrined in article 23.1 of the Spanish Constitution, according to which "citizens have the right to participate in public affairs, directly or through representatives, freely chosen in periodic elections by universal suffrage".

The councilors' request for access to the requested information is based on the aforementioned fundamental right of Article 23.1 CE, which "para los asuntos públicos

municipales is developed, in one of its aspects, in article 77 of the LRBRL (...)" (STS September 15, 1987).

The exercise of this right of access to municipal information is in any case subject to certain conditions provided for in the TRLMRLC, cited, and in the Regulation on the organization, operation and legal regime of local entities (ROF), approved by Royal Decree 2568/1986, of November 28, without prejudice to what may be established by the regulation of organization and operation of each local entity.

Article 164. 2 TRLMRLC, provides in which cases the services of the corporation must provide information directly to the elected members. Outside the cases of direct access to information or documentation, article 164.3 TRLMRLC provides that: "In other cases, the request for information is understood as accepted by administrative silence if no negative resolution is issued in the term of four days from the date of presentation of the request. In any case, the negative decision must be motivated, and can only be based on the following assumptions:

- a) When the knowledge or dissemination of the information may violate the constitutional right to honor, personal or family privacy or one's image.
- b) When it comes to matters affected by the general legislation on official secrets or summary secrecy."

Access requests may be denied when any of the circumstances provided for in sections a) or) occur, but access may also be denied, given the nature of the right to data protection (STC 292/ 2000), when, regardless of whether certain data can be considered intimate or not, there are other specific circumstances related to the personal data that justify it.

Access to municipal information that 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 in question, in the terms provided for in the legislation of local regime. It will be necessary to carry out a weighting exercise in order to assess the implications that the exercise of the councilors' right of access to information may have in each case for the rights of the people affected, such as the right to the protection of personal data (article 18.4 EC).

In the case presented, access is requested to all personnel contracts and the respective recruitment files processed by a municipal body - the Municipal Sports Institute -, during a period between 1996 and 1998 (until July inclusive).

The entity about which information is requested is not part of the autonomous bodies currently linked to the City Council. According to the corporate website, the management of municipal services related to sport has been carried out since 1998, through a wholly municipal capital company, incorporated on July 14, 1998 (according to what can be seen from its statutes).

The councilor bases his request on the fulfillment of his tasks, without setting out the specific reasons for which he is interested in obtaining the requested information. Local regime legislation only requires councilors to access municipal information

must explain or substantiate the purpose of their request, given that in accordance with the repeated jurisprudence of the Supreme Court, the reason for their request must be understood as implicit in the exercise of control functions and inspection of the governing bodies of the corporation, as explained in article 22.2.a) of the LRBRL. Even so, in cases where there is information of a personal nature, the fact of explaining the reasons why access is of interest can be an important element to take into account when making a careful weighting between the right of access to councilors' information and the right to data protection of the affected persons.

In this context, it is appropriate to analyze the nature of the personal information that could be affected, and assess whether the councilor's access to this data is necessary for the performance of his functions of control and supervision of the governing bodies.

### III

With regard to access to the contracts signed by the Municipal Institute during the period of time requested (between 1996 and 1998, July included), the following considerations are made.

In general, employment contracts can include, apart from identifying data of the worker, information about the professional category, description of functions, duration or place where the task must be carried out, (data relating to the employment), the data corresponding to the total gross remuneration distributed, if applicable, in different remuneration concepts (remuneration data), this without ruling out any specific clauses that may exist in some cases, in relation to workers in a situation of social exclusion, victims of gender violence, or others who deserve special protection.

In this case, the councilor requests indiscriminate access to all personnel contracts formalized twenty years ago by a municipal entity during the period between 1996 and July 1998, the date on which a commercial company would have been established municipal, and from which it seems that the Municipal Institute would have been extinguished.

We do not know the number of contracts affected, but in any case access to the requested contracts could be relevant to check the remuneration and working conditions agreed at the time with certain personnel of the Municipal Institute, for the purposes of assessing the cost of human resources linked to the management of municipal public services. Based on this premise, councilors should be able to have the documents and background that enable them to make the necessary checks. In this sense, checking the content of the clauses agreed at that time with the workers may be necessary for the purposes of evaluating the current situation and the decisions that the governing bodies may take in this regard.

Having said that, it is possible that there are people who do not currently have a contractual relationship with the corporation or with any of the municipal bodies or companies. Information about a person's employment and remuneration conditions is an intrusion into their privacy that can affect their personal and professional sphere. It is true that in this case, the information on the employment situation of these people who no longer work for the corporation or any entity that depends on it, would refer to twenty years ago, and in principle, the passage of time should mean a lesser degree of impact on your privacy. Although

thus, it must be borne in mind that the principle of quality (art. 4 LOPD), in addition to requiring access to occur within the framework of a legitimate, determined and explicit purpose (in this case, the development of the function that the law recognizes councillors), also provides that personal data can only be collected to be processed, as well as subjected to this processing, when they are adequate, relevant and not excessive in relation to the purpose in question.

The documents to which access is sought were formalized in a previous mandate (20 years ago), and under the responsibility of different governing bodies to the current one. Knowing the identity of the people who were hired at the time and their working and remuneration conditions can be relevant in the event that these people continue to work and provide public services in one way or another. This would be the case for people hired during these years and who continue to work for the municipal company, as a result of contractual subrogation. These would be workers who provide public services, and the content of the contractual information that may be contained in the claimed documents may undoubtedly be relevant, so that the councilor may question or demand actions from the current governing bodies in the exercise of their legitimate functions, even identifying these workers.

This, without prejudice to the fact that the data that by their nature require special protection should be omitted in advance, access to which must be limited, unless the express consent of the affected persons is available (art. 7 LOPD), as well as the identifying data (DNI number, Social Security number, signature, telephone, address or others) that would not be necessary to achieve the councilor's control function.

In any case, it would be necessary to give the affected persons a hearing procedure (art. 3.e) LOPD), so that they can make the appropriate considerations if there are any personal circumstances that make it advisable to limit access to their information.

In the case of workers who do not currently maintain any contractual relationship with the corporation or entities that depend on it, it could be relevant to access information on the content of the contractual conditions agreed by each of the workplaces, during a period in that the management of the service was done by a different body to the current one, but this information could also be obtained by having the documents anonymized and without the need to sacrifice the privacy of the workers affected.

#### IV

With regard to access to the procurement files processed, it is foreseeable that these will contain information on the calls made, their content, the advertising mechanisms used, and in general any other information related to compliance with the administrative requirements of the procedure, information that in principle could not incorporate personal data and therefore access to it should not pose any inconvenience from the perspective of personal data protection regulations.

To this information should be added the information about the people who may have participated in the process. In general, personnel selection processes for the provision of jobs tend to incorporate a lot of personal information of the people who participate, such as participation requests; resumes and documentation

contributed by the candidates for the purpose of assessing the merits (services rendered, university qualifications, skills in information and communication technologies, languages, etc.); the lists of admitted and excluded; any tests carried out; the records of the corresponding qualifying tribunal, which include the evaluations of the alleged merits, and if applicable, of the interviews carried out and the proposed appointment or employment agreement of the candidate finally selected.

At the time of issuing this report, it is unknown what type of selective procedures were followed, what tests or merits were assessed or the number of applicants who applied. Despite this, it is necessary to start from the premise that these are competitive procedures, based on the principles of equality, merit and capacity, transparency and publicity.

In this context, and to fulfill the purpose of control and inspection of the governing bodies, the councilor should be able to have that information that allows him to check that the people hired at the time by the Municipal Institute, were, in accordance with the procedural selection rules established to cover the job (official or labor), with full respect for the guiding principles of these procedures.

It could also be that what is intended is not so much to evaluate the correctness of the procedure that was carried out at the time, as to analyze the capacity or aptitude of the people selected to occupy the positions they currently occupy.

Be that as it may, in general the councilors must be given the possibility of accessing the different documentation generated by this body during the process in order to be able to evaluate the correctness of the procedure followed and the merits of the selected person.

Access to the identity and the score obtained by the chosen person in relation to professional experience, academic training or in relation to the tests carried out, if they have been carried out, provides information for the purposes of detecting possible arbitrary actions by the body in charge of making the selection, which should act within the parameters of technical discretion that are recognized. Therefore, it cannot be ruled out that it might be necessary to know the score obtained in relation to the merits provided for in the call, as well as, where appropriate, that of each of the tests that have been carried out, the assessment of which should justify that it is this person who has finally been selected to occupy a certain job.

If what is intended is to check possible irregularities committed during those years in relation to the recruitment of the staff of this municipal body, it could be relevant to access this information about all the selected candidates regardless of whether or not they are currently working for the corporation or in any of the municipal organizations or companies. From the perspective of data protection, the degree of interference with privacy is less if the information refers to a job held in the past than the one currently held. We must bear in mind that these would be public employees, and for the purposes of detecting possible irregularities, knowing the identity of the person who would have benefited from an eventual irregular action can undoubtedly be relevant.

Beyond this, and with respect to the documentation certifying the merits (curriculum vitae, academic degrees, etc.), or access to the specific content of the tests carried out (interviews, psychotechnical tests, exams, etc.) of the selected people, given the degree of meddling on

the privacy of the people affected, we understand that it would only be justified in the event that those selected continue to work for the corporation or the bodies that depend on it. Otherwise, access to this information would seem a priori excessive.

However, it cannot be ruled out that the files may contain particularly protected information, either because it has been provided by one of the candidates (e.g. disabilities, need to adapt certain tests, etc.), either because as a result of any of the tests carried out (e.g. psychotechnical tests involving the assessment of aspects of personality). This data should be excluded from access, in accordance with article 7 of the LOPD.

With regard to the information on the rest of the people participating in the different selection processes, it cannot be ruled out that it may be relevant to know the respective assessments obtained in order to be able to compare them with the chosen candidates. However, if necessary, there are no reasons to justify doing so in such a way as to identify the affected person. Therefore, it could be done anonymously.

In any case, it would be necessary to give the affected persons a hearing procedure (art. 3.e) LOPD), so that they can make the appropriate considerations if there are any personal circumstances that make it advisable to limit access to their information .

## VII

Finally, it should be remembered that the right of access of all councilors to information must always be governed, among others, by the duty of reservation, in the terms of article 164.6 of the TRLMRLC, cited, according to the which:

"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."

According to this article, the members of the Corporation have the duty to keep a reservation in relation to the information provided to them to make possible the development of their function.

This duty of secrecy is also explicitly provided for in article 10 of the LOPD, according to which:

"The person in charge of the file and those who intervene in any phase of the processing of personal data are obliged to professional secrecy with regard to the data and the duty to save them, obligations that remain even after the end of their relations with the owner of the file or, where appropriate, with its manager."

In relation to the duty of secrecy, according to the provisions of the Penal Code (articles 197 and 198), the authority or public official who, outside of the cases permitted by law and taking advantage of his position, disseminates, reveals or transfers to third parties certain data, would be carrying out conduct that could constitute the crime of discovery and disclosure of secrets.



The duty of secrecy of councilors extends to the information to which they have access as members of the General Meetings of the municipal companies in which they participate, given that their actions also obey the position of councilor they hold.

### **conclusion**

The data protection regulations do not prevent councilors from accessing contracts and the information contained in the selection process about the people who currently work for the corporation or the bodies that depend on it, as long as the procedure for audience to the affected people and no personal circumstances result that could limit access. This, without prejudice to omitting prior to access the personal data deserving of special protection (art. 7 of the LOPD), as well as other data (DNI number, Social Security number, signature, telephone, address or others) that would not be necessary to achieve the councilor's control function.

As for the hired people who do not currently work there, there would be no problem in providing their identity and the assessment obtained in the respective selection processes. On the other hand, the contracts of these people and the information contained in the files about the rest of the participants can be given anonymously.

Barcelona, February 5, 2018