

IAI 6/2018

Claim: 20/2018

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 for the denial of a citizen's access to the declarations of assets and interests of the elected officials of the City Council of (...)

The Commission for the Guarantee of the Right of Access to Public Information (GAIP) asks the Catalan Data Protection Authority (APDCAT) to issue a report on claim 20/2018 presented by a citizen against the City Council of (...) in relation to the denial of access to the declarations of patrimonial assets and interests of the elected officials of this council.

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 January 8, 2018, a citizen requested the City Council of (...) access to the original declarations of assets and interests of the elected officials of this council.
2. On January 17, 2018, the City Council of (...) decides to deny the citizen access to the requested information, arguing that the information accessible in this regard is that determined by article 8.1.h) of Law 19/2013, of December 9, on transparency, access to public information and good governance.
3. On February 1, 2018, the citizen lodged a complaint with the GAIP against the City Council of (...) for denying access to the requested public information.
4. On February 28, 2018, the GAIP requests this Authority to issue the report provided for in article 42.8 of Law 19/2014, of December 29, on transparency, access to public information and good government, 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 LOPD Deployment Regulation, (RLOPD), approved by Royal Decree 1720/2007, of 21 of December). 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

The claim is lodged against the denial of access to the declarations of patrimonial assets and interests of the elected officials of the City Council of (...). Specifically, the claimant requests access to the original documents.

In accordance with article 75.7 of Law 7/1985, of April 2, regulating the bases of the local regime (hereafter, LRBRL), before taking possession of the position, on the occasion of termination and at the end of the mandate, as well as when the factual circumstances change, local representatives and non-elected members of the Local Government Board must make two statements: one "on causes of possible incompatibility and on any activity that provides or can provide economic income" and another on "their assets and participation in companies of all types, with information on the companies in which they participate and on the self-assessments of income taxes, assets and, if applicable, companies".

According to this same precept of the LRBRL, these declarations must be made following the models established for that purpose by the respective municipal assemblies. In the event that the corporation does not have a formalized model, it will be necessary to adhere to the provisions of article 31 of the Regulation on organization, operation and legal regime of local entities, approved by Royal Decree 2568/1986, of 28 of November (hereinafter, ROF).

In accordance with the declaration models approved by the City Council of (...) through its Municipal Organic Regulation (BOPT no. 73, of March 28, 2015), in the declaration of

patrimonial assets and interests (annex II) it is necessary to state, apart from the identifying data of the person declaring (name, surname, ID number and signature), data of social circumstances (properties or possessions, including vehicles and other movable property of special value) and economic-financial and insurance data (shareholdings in companies; bank accounts and deposits; life insurance, pension plans, miscellaneous income, rights derived from intellectual or industrial property, etc.; debts; and information on the settlement of taxes -income, property and companies-).

This statement must be accompanied by the supporting documentation of the tax settlement, either by means of a photocopy of the corresponding income or return document, or by means of a certification issued by the Tax Agency.

From the point of view of the protection of personal data, facilitating access to the declarations of assets and interests made by the elected officials of the City Council of (...), which contain personal data, constitutes a transfer of data (article 3.i) of Organic Law 15/1999, of December 13, on the protection of personal data (LOPD)), which, as such, must be subject to the regime provided for, with general, for transfers or communications of data to the LOPD.

Article 11.1 of the LOPD establishes that "the personal data subject to treatment can only be communicated to a third party for the fulfillment of purposes directly related to the legitimate functions of the assignor and the assignee with the prior consent of the interested party ." However, in accordance with article 11.2 a) of the LOPD, the transfer of data will be appropriate, without the consent of the interested party, when this transfer is covered by a rule with the rank of law.

It is necessary to analyze Law 19/2014, of December 29, 2014, on transparency, access to information and good governance, and determine whether it would give legal cover to a communication or transfer of data such as the one proposed in this case.

III

Article 18 of Law 19/2014 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 legal entity constituted" (section 1).

The mentioned article 2.b) defines "public information" as "the information prepared by the Administration and that which it has in its power as a result of its activity or the exercise of its functions, including the which are supplied by the other obliged subjects in accordance with the provisions of this law".

State Law 19/2013, of December 9, on transparency, access to public information and good governance, is pronounced in similar terms, in its articles 12 (right of access to public information) and 13 (definition of public information).

However, in accordance with article 20 et seq. of Law 19/2014, the right of access to public information may be denied or restricted for the reasons expressly established in the laws. Specifically, and with regard to information that contains personal data, it is necessary to assess whether or not the right to data protection of the affected person justifies the limitation of the right of access to public information regulated in Law 19 /2014 that the applicant invokes.

In the present case, the claimant wants access to the declarations of assets and interests made by the elected officials of the City Council of (...), public information which, in view of the volume of personal data that may include – mentioned in the previous section-, allows to draw up an economic profile of the person making the declaration, as well as to evaluate certain aspects of their behavior, such as the consistency of their public performance, in relation to their performance in the private sphere, as would be the case of the activities or investments carried out. On the other hand, the information contained in these statements could not only refer to the elected office or other member of the Local Government Board, but also to their spouse and/or their descendants.

However, in view of the property declaration model approved by the City Council, it does not appear that there should be particularly protected information, for the purposes of article 23 of Law 19/2014, therefore access to this information requires a prior weighting between the public interest in the disclosure of information and the rights of the persons affected, as required by article 24.2 of Law 19/2014:

"2. If it is other information that contains personal data not included in article 23 (specially protected data), access to the information can be given, with the previous reasoned weighting of the public interest in the disclosure and the rights of the affected people

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. (...)"

IV

For the purposes of said weighting, it must be borne in mind, at the outset, that Law 19/2014 directly imposes on the obliged subjects certain duties of active publicity in relation to information on the patrimonial situation of their high-ranking officials. To the extent that this information must be public, it is clear that citizens must also be able to access it when they request it.

Specifically, article 11.1 of Law 19/2014 establishes that they must be made public:

"b) Remuneration, compensation and per diems, the activities and assets of the members of the Government, of the senior positions of the Public Administration and of the management staff of public bodies, companies, foundations and consortia, and the compensations that have to be perceived when ceasing to hold office."

Regarding this, article 4.2.b) of Law 19/2014 provides that, for the purposes of the provisions of this law, local representatives and holders of higher bodies are considered to be high-ranking officials in the service of the local administration and managers, in accordance with what is established by the local regime legislation.

Therefore, for the purposes of interest, it should be borne in mind that the City Council of (...) is obliged to publish information on the heritage assets declared by its senior officials, including the Mayor and councillors, on its website or electronic headquarters (article 5.1 Law 19/2014).

Law 19/2014 does not specify, however, which personal data must be disseminated for the purposes of complying with this obligation of active advertising. It only points out, in its article 56.2, that "a statement must be made public that indicates the patrimonial situation of high-ranking officials, which must not include their location data or those that are necessary to safeguard the privacy and the security of the holders".

State Law 19/2013, of December 9, on transparency, access to public information and good governance is pronounced in similar terms. Its article 8.1 provides that:

"1. The subjects included in the scope of application of this title must make public, at least, the information relating to the acts of administrative management with economic or budgetary impact that are indicated below: (...) h) The annual declarations of goods and activities of local representatives, in the terms provided for in Law 7/1985, of April 2, Regulating the Bases of the Local Regime. When the regulation does not set the terms in which these declarations must be made public, the provisions of the regulations on conflicts of interest in the scope of the General Administration of the State will apply. In any case, the data relating to the specific location of the real estate will be omitted and the privacy and security of its owners will be guaranteed. (...)".

Law 3/2015, of March 30, regulating the exercise of the high office of the General Administration of the State - which repeals the regulations on conflicts of interest in the field of Administration General of the State referred to - establishes, in article 21, that:

"5. The content of the declarations of assets and patrimonial rights of the members of the Government and of the Secretaries of State and other High Positions will be published in the "Official Gazette of the State", in the terms provided for by regulation. In relation to the patrimonial goods, a comprehensive statement of the patrimonial situation of these High Charges will be published, omitting any data relating to their location and safeguarding the privacy and security of their owners."

From these forecasts it can be inferred that it is not required to publish the full statement presented by the elected officials or other members of the Local Government Board, but rather a statement that allows knowledge of their patrimonial situation.

It can be said, therefore, that the obliged subjects have a certain margin of action to decide what information will be published, with the understanding that, in any case, the data relating to the location of the goods will not be included nor those others that are unnecessary in view of the purpose intended for their dissemination, that is to evaluate the patrimonial situation of the public representative at the beginning and at the end of his mandate and to check that any variation of this patrimony (enrichment) is consistent or justified

Omission of data that is not only required by the application in the case of the provisions of the aforementioned transparency regulations (article 56.2 Law 19/2014 and article 8.1.h) Law 19/2013),

but also the application of the principle of data minimization established in the data protection legislation (article 4 LOPD and article 5.1.c) of Regulation (EU) 2016/679, of the Parliament and of the European Council, of 27 April 2016, General Data Protection Regulation (hereinafter, RGPD), applicable from next May 25, 2018).

Considering that the City Council of (...) must publish information on the patrimonial situation of the elected officials and other members of the Local Government Board, in the terms set out, there can be no doubt about handing it over to the claimant person

In fact, it seems, in view of the complaint presented to the GAIP, that the person making the claim would already have the information that the City Council would have published in this regard through its transparency portal. However, it has not been possible to verify what this information is, given that, at the date of issue of this report, it is not available.

However, as can be seen from the agreement adopted by the plenary session of the corporation on February 18, 2016 on the conditions under which the dissemination of information on the activities and assets declared by the members of the corporation, a copy of which is attached to the file, this information would consist of a table containing information on the assets declared, and if applicable the patrimonial variations declared subsequently, by the local representatives.

According to this same agreement, any data that would allow the specific location of real estate within the municipality where they are located, as well as information from the Property Registry and the cadastral reference, should be excluded from the aforementioned table. For vehicles, the corresponding number on the license plate should be excluded. And, with regard to the identifying data of the reporting persons or third parties, only the first and last names should be included.

v

Having said that, it must be borne in mind that the claimant's request for information refers to the "original" declarations of assets and interests made by the elected officials of the City Council. In other words, it requests information that goes beyond that which must be the subject of dissemination, given that, as we have seen, the regulations do not require publishing the full statement.

At this point, it is necessary to mention, again, the provisions of article 56.2 of Law 19/2014, which establishes that "access to the registers of declarations of patrimonial assets and interests is governed by their regulations specific (...)".

The specific regulation to which this precept refers is, in the case at hand, local regime legislation.

Article 75.7 of the LRBRL, already cited, provides that the declarations to be made by the local representatives, as well as the non-elected members of the Local Government Board, will be entered "in los siguientes Registros de intereses, which will have public character:

- a) The statement on causes of possible incompatibility and activities that provide or may provide economic income, will be registered in the Register of Activities established in each local entity.

b) The declaration of assets and patrimonial rights will be registered in the Register of Patrimonial Assets of each local Entity, in the terms established by its respective statute."

The same article establishes that, in cases where the personal safety or that of your assets or businesses, or that of third parties, may be threatened, the declaration of your assets and patrimonial rights can be registered in the Special Register of patrimonial assets, and provide the secretary of the respective entity with a mere certification that certifies that the declarations have been formalized before the secretary of the provincial council or, where appropriate, before the competent body of the autonomous community.

In these exceptional cases, where access to the information could pose a risk to the personal safety of the reporting persons or third parties, it is clear that access to the information alone should be denied to the person making the claim. tendered (circumstance expressly provided for in article 24.2 d) Law 19/2014).

In the area of Catalonia, the Consolidated Text of the Municipal and Local Regime Law of Catalonia, approved by Legislative Decree 2/2003, of April 28 (hereinafter, TRLMRLC), only attributes public status to the Register of Causes of possible incompatibility and activities, and specifies that councilors and people who prove a legitimate and direct interest have the right to consult the:

"163.3 The register of interests is under the direct responsibility of the president of the corporation or the member to whom he delegates. The register of causes of possible incompatibility and of activities is public, and the members of the corporation have the right to consult it, as well as all persons who prove a legitimate and direct interest."

This need to prove the status of a legitimate and direct interested party is also mentioned by the ROF, in this case, without making distinctions between Registers:

"Article 32.

In order to access the data contained in the Register of Interests, it will be necessary to prove the legal status of direct legitimate interest, in accordance with the applicable regional or state legislation."

Given the regulatory framework of reference, it is clear that the Register of patrimonial assets of the City Council, in which the declarations of patrimonial assets and interests requested by the claimant are registered, is public.

However, for the purposes at hand, and from the perspective of data protection, the fact that a record is public does not necessarily mean that the personal data contained therein become freely accessible to anyone.

In this regard, it should be borne in mind that Law 39/2015, of October 1, on the common administrative procedure of public administrations, recognizes the right of access of citizens to public information, to administrative files and records (as would happen in this case), always in accordance with current legislation on transparency and the rest of the legal system (article 13.d)). In this case, as we have seen, in attention to the nature of the information requested, prior weighting between the public interest in the disclosure of the information and the rights of the persons affected.

According to the information available, in the present case the claimant does not hold the status of councilor in the City Council. Therefore, it cannot be understood that the access to the Registry of patrimonial assets is framed within the right to information that corresponds to any member of the corporation for the exercise of the functions attributed to them by local regime legislation (article 77 LRBRL and articles 163.3 and 164.1 TRLMRLC).

In accordance with article 18.2 of Law 19/2014, the exercise of the right of access is not subject to motivation, but the fact that the applicant expresses what is the purpose he pursues and ultimately the reasons for who are interested in knowing the information adds a very important element to take into account as a weighting criterion.

It is stated in the file that the claimant alleges that "having observed some incidents in the declaration of assets of the councilors and elected officials of the City Council of (...), he would like to be able to access the originals of the aforementioned declarations and the corresponding modifications".

However, it does not provide any other elements that would clarify which incidents are involved. It would be relevant, for the purposes of the aforementioned weighting, to be able to have more information about it. Thus, as an example, in the event that the incident detected is related to the omission of some data, it cannot be ruled out that, depending on what this data is, its lack corresponds to compliance by the City Council of the applicable regulations and, therefore, it is justified not to provide it (for example, data relating to the location of the declared assets).

Despite this, it is understood that the request for information would be related to the control and transparency of municipal management, a purpose to which Law 19/2014 itself responds (article 1.2), and which also includes the evaluation of the public activity of elected officials and the control of any increase in their assets as a result of this public activity.

This being the intended purpose, it could certainly be understood that the right of access requested by the claimant would already be satisfied by providing him with the same information that the City Council must publish through its transparency portal, in compliance with the active advertising obligation established in articles 11.1.b) and 56.2 of Law 19/2014.

Now, as we have seen, the transparency legislation is not precise when defining the content or the specific scope of this obligation, except to establish the omission of certain data. Thus, it is possible for the published information to be concise (for example, referring only to the total amount of the reporting person's assets and liabilities, without any additional data, beyond differentiating the amount that corresponds to real estate than what corresponds to other movable property and rights), be more precise (adding to this same information a brief indication of the origin of certain assets (donation, inheritance or legacy, etc.)), or more extensive and detailed (specifying the type of asset declared (flat, premises, farm, vehicle, boat, etc.), the percentage of ownership of the asset, the year of acquisition, etc.).

It is also possible that the published information on the patrimonial situation is not updated and, therefore, does not show possible modifications of this patrimony that occurred throughout the mandate of the public representatives.

In the present case, as has been said, it is unknown what specific information the City Council publishes or has published in this regard, except for the fact that it would correspond to a table with information about the

statements presented by local representatives. As stated in the above-mentioned agreement adopted by the General Assembly of the corporation on February 18, 2016, the updating of the data in these tables will take place during the first quarter of each calendar year and on the occasion of the renewal of the corporation.

For the purposes that the citizen can carry out effective control of public management and the retention of accounts in this area, it cannot be ruled out that it may be convenient to have information on the patrimonial situation of elected officials with the greatest degree of concreteness that is possible. The more detailed the information provided on the assets declared by the public representative, it seems that it would be easier to control whether any increase in this asset during the exercise of his mandate is consistent or justified, or if there are reasons to justify the demand for an investigation in this regard by the competent body.

Information that, in any case, must be truthful and permanently updated (article 6.1.a) ib) Law 19/2014), otherwise it would not be possible to make an adequate comparison, see if there has been enrichment and, especially, if this is justified.

The claimant does not specify in their request for access the elected positions in respect of which they are interested in obtaining the declaration of patrimonial assets, having detected some incidents in their patrimonial situation after seeing the information that the City Council would have published, nor nor the nature of these incidents. Having this information would make it possible to delimit the possibility of partial access, both from the point of view of the elected officials affected, and of the information to be delivered.

As we have seen, in the declarations of patrimonial assets there must be personal information whose knowledge is unnecessary to achieve the intended purpose of control and which, therefore, should be excluded (article 4 LOPD and article 5.1. c) RGPD). This would be the case, for example, of the declarant's data relating to his ID number, his handwritten signature, the current account number or the entity in which the person has deposited his money or with which he has contracted a certain insurance or pension plan, etc.

Also, in these statements there will be other information that, if revealed, could put at risk the personal safety of the public official or that of his family members and, therefore, should also be excluded from access (article 24.2.d) Law 19/2014). This would be the case for information relating to the location of the assets declared, whether real estate or movable property.

But, beyond these cases, in which it is clear that the claimant's access should be restricted, we cannot rule out the existence of other cases in which, even though the information may be necessary, also it would be reasonable to deny or limit access.

This could happen, for example, in the case of declaring movable property of special value. This is strictly patrimonial information a priori relevant for the purposes of carrying out a control over the performance of the public representative but its disclosure could endanger the security of the property itself and, therefore, indirectly also that of the declarant himself or of third parties.

On the other hand, it should be borne in mind that in the property declaration model approved by the City Council there is a section of observations intended for the persons declaring to record any other property information they consider relevant, in respect of which

does not know its content, so it cannot be established whether knowledge of the data that may be contained in it by the applicant would be relevant in this case.

Having said that, there is no evidence that the request for information has been forwarded to the affected people (the elected officials). Article 31 of Law 19/2014 establishes that if the request for public information may affect the rights or interests of third parties, identified or easily identifiable, they must be forwarded the request, so that can make the allegations they consider appropriate, in those cases where they may be decisive for 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 of access.

Faced with a request for public information such as the one examined in the present case, it cannot be ruled out that it is in the interest of the affected person (the elected official) to allow the person requesting access to their declaration of assets, for the purpose of dispelling any doubts about any irregular variation of their patrimonial situation during their mandate.

It is up to the City Council to carry out this hearing process for those affected prior to the resolution of the citizen's access request (Article 31 Law 19/2014), as well as to the GAIP once the corresponding claim (article 42.3 Law 19/2014). For these purposes, the GAIP can use the data contained in the file to get in touch with those affected, or request the complained entity to provide it with their data that can be used to put - get in touch.

All in all, with the information available and making a general weighting, it does not seem that, from the point of view of data protection, the claimant's right to access the property declarations can be admitted patrimonials in the terms in which he requests them, this is the complete original declarations of all the elected positions of the City Council.

This is without prejudice to the fact that, having examined the content of property declarations and previously omitting personal information that may affect the security of the persons declaring or is unnecessary, it is possible to admit access to the rest of the data.

Article 25.1 of Law 19/2014 establishes, in this regard, that "if any of the access limits to public information established by the previous articles are applicable, the denial of access only affects the corresponding part of the documentation, and restricted access to the rest of the data must be authorized."

conclusion

In view of the regulations on the protection of personal data, the claimant's access to the full original declarations of patrimonial assets made by the elected officials of the City Council of (...) is not justified. However, the original declarations could be provided with the omission of the personal data that are unnecessary to achieve the intended control purpose, in the terms indicated in this report.

Barcelona, March 19, 2018