

Ref.: IAI 8/2018

Claim: 31/2018

Legal report issued at the request of the Commission for the Guarantee of the Right of Access to Information Public in relation to the claim for the denial of access to sanctioning procedures initiated by an entity for the activity of housing for tourist use

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 31/2018 submitted in relation to the denial of access to sanctioning procedures initiated by an entity for housing activity for tourist use.

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

Background

1. On December 19, 2017, the person making the claim addressed to the city council a request for access related to the disciplinary proceedings instituted by that city council for violations of Law 13/2002, on Tourism of Catalonia.
2. On January 18, 2018, the head of the city council issued a resolution partially accepting the request for information.
3. On February 19, 2018, the claimant submitted a claim to the GAIP in which he requested that a resolution be issued agreeing to provide the requested information to the City Council and, specifically, note that the City Council has stopped providing the relevant information to:

"Number of procedures for the protection of legality that have been initiated by the City Council due to an alleged violation of Law 13/2002, of June 21, on Tourism of Catalonia.

- a) Of all these administrative procedures, how many of them have started with evidence consistent with an inspection report of screenshots of the Airbnb platform.
- b) Of all the aforementioned administrative procedures, how many of them have been initiated at homes that are configured as the habitual residence of their holders.
- c) Of all the aforementioned administrative procedures, how many of them have been initiated against the owners of the respective homes; and how many of them have

filed in the name of the owner as a consequence of his allegations and then they have been filed in the name of the lessee who had rented the house.

d) Of all the sanctioning procedures mentioned, how many of them have been accepted in accordance with article 105 of Law 13/2002, of Tourism of Catalonia to the possibility of obtaining a 50% discount on the sanction and thus supported the half the amount Likewise, a report of the data only of the domicile object of the sanction, taking into account that the City Council has collected the amounts in the concept of an economic activity in a location that, therefore, is not the object of protection by the Organic Law 15/ 199, of Personal Data Protection".

4. On February 26, 2018, the GAIP requests a report from the City Council in relation to the claim submitted and the file relating to the access request.

5. On March 16, 2018, the City Council sends the GAIP the required report and a copy of the completed file in which it reiterates the concurrence of the limits established in articles 21, 23 and 29 of Law 19 /2014, of December 29, on transparency, access to public information and good governance.

6. On March 21, 2018, the GAIP requested this Authority to issue a report in relation to the claim submitted.

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). It is therefore beyond the scope of this report whatsoever

other limit or aspect that does not affect the personal data contained in the requested information.

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

To focus the analysis it is necessary to take into consideration article 18 of the LTC, and in similar terms article 12 of Law 19/2013, of December 9, on transparency, access to information and good governance (LT), which establish as a general principle that all people have the right to access public information in the terms provided for in the law.

According to article 19 of the LTC, public information means:

"...the information prepared by the Administration and that which it has in its possession as a result of its activity or the exercise of its functions, including that supplied by the other subjects obliged in accordance with what this law establishes".

In accordance with this definition, the documents forming part of the proceedings instituted by the City Council for alleged violations of Law 13/2002, of June 21, on tourism in Catalonia, and specifically those that form part of the sanctioning proceedings subject to the claim, they are public information to which citizens have the right to access in the terms provided for in the regulations on transparency, access to public information and good governance.

However, it must be taken into account that, in accordance with articles 20 et seq. of the LTC, the right of access to public information may be denied or restricted for the reasons expressly established by law. Specifically, with regard to the protection of personal data, it will be necessary to assess, first of all, whether the information requested contains personal data and, if so, assess whether or not the data is or is not particularly protected data (art. 23 LTC), and in the case of personal data not included in article 23, carry out a reasoned weighting between the public interest in disclosure and the rights of the affected persons.

Article 23 of the LTC establishes that requests for access to public information must be denied if the information sought contains "specially protected personal data, such as those 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 a public reprimand to the offender, unless the affected party expressly consents to it by means of a written document that must accompany the request."

In this same sense, article 15.1 of the LT, establishes:

"...If the information includes specially protected data 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 the public admonition to the offender, access may only be authorized if the express consent of the affected person is counted or if he or she is covered by a law. "

In the case at hand, of all the information requested in the claim submitted, only the address of tourist accommodation sanctioned for violations of Law 13/2002, of June 21, can be considered personal data , of tourism in Catalonia. Therefore, nothing would prevent, from the point of view of the protection of personal data, to deliver the rest of the requested information.

With regard to the data on the address of the accommodation for tourist use, it must be taken into account that various situations can occur both with regard to the holders of these sanctioned accommodation for tourist use, which can be natural persons or legal entities , as with regard to the circumstances relating to accommodation, which in many cases can constitute the habitual residence of the sanctioned.

Thus, article 3 a) of the LOPD defines personal data as "any information relating to identified or identifiable natural persons", and Royal Decree 1720/2007, of December 21, which approves the Regulation of deployment of the LOPD (RLOPD) establishes that this regulation will not be applicable to the processing of data referring to legal entities", (art. 2.2); and considers as an identifiable person "any person whose identity can be determined, directly or indirectly, through any information referring to their physical, physiological, psychological, economic, cultural or social identity", as long as this identification does not require " disproportionate terms or activities" (article 5.1.o).

Therefore, the limit of article 23 of the LTC will not apply in cases where the owners of tourist accommodation are legal entities, as legal entities do not have the right to data protection personal

III

Article 2.3 of the RLOPD provides that the data relating to "individual entrepreneurs", when reference is made in their capacity as traders, industrialists or shipping companies, must also be understood as excluded from the protection application regime of personal data.

However, the interpretation that is made of these assumptions of the RLOPD must not contradict what can be deduced from the LOPD and, therefore, a restrictive interpretation of this must be made

precept in order to prevent certain personal data processing cases from falling outside the control of data protection regulations. And this is what this Authority has stated in several opinions, such as CNS 16/2009, CNS 53/2016, or CNS 57/2015.

The exclusion provided for in article 2.3 of the RLOPD must be understood as referring exclusively to individual entrepreneurs who have the status of traders, industrialists or shipping companies (or to natural persons who act on their behalf), and only when the data of the individual entrepreneur is used in a context that we could describe as strictly professional.

In order to determine the applicability of article 2.3 of the RLOPD to the activities that are the subject of the claim, it will be necessary to determine whether the activity of accommodation for tourist use is included in what can generally be considered as "commercial activity", which is why it will be necessary to take into account the sectoral regulations.

According to article 1 of the Commercial Code:

"They are merchants for the purposes of this Code: 1º.

Those who, having the legal capacity to carry out the trade, usually dedicate themselves to it. 2nd Mercantile or industrial companies that were established in accordance with this Code."

Article 3 of the Commercial Code provides that:

"The legal presumption of the usual exercise of commerce will exist, since the person who proposes to exercise it announces through circulars, newspapers, posters, signs exposed to the public, or in any other way, an establishment that has as its object some commercial operation."

Article 6.3 of Law 3/1993, of March 22, basic of the official Chambers of Commerce, Industry and Navigation provides that:

"Article 6 Membership of the Chambers and public census of companies

3. It will be understood that a natural or legal person carries out a commercial, industrial or shipping activity when for this reason it is subject to the Economic Activities Tax or tax that replaces it."

On the other hand, Law 14/2002, of June 27, of the official Chambers of Commerce, Industry and Navigation of Catalonia and of the General Council of the Chambers, provides in its article 16.1 that:

"Electors of the official chambers of commerce, industry and navigation are natural and legal persons, regardless of their nationality, who **carry out a commercial, industrial or shipping activity** in Spanish territory, in the terms established by **article 6 of State Law 3/1993**, and that have establishments, delegations or agencies in the territorial scope of the respective chamber, when for the activity

corresponding are subject to the tax on economic activities or the tax that replaces it."

The activity of housing intended for tourist use is subject to economic activity tax, within group 68 (Hospedage Services) and within it in groups 685 "Alojamientos turísticos extrahoteleros" or 686 "Explotación de private apartments through an agency or organized company", in accordance with the provisions of Royal Legislative Decree 1175/1990, of September 28, which approves the rates and the instruction of the IAE.

Now, although the activity of accommodation for tourist use is a commercial activity and that the holders are considered traders for the purposes of article 2.2 of RLOPD, this must not imply that necessarily and in all cases are excluded from the sphere of protection of the LOPD since it is necessary to differentiate when a data of the individual entrepreneur refers to the private life of the person and when to the business activity. In the first case, the protection of the LOPD comes into play.

Thus, Sentence SAN 2363/2011, (Rec. 31/2010), determines that this task of differentiation between the purely private and business spheres can be based on two different and complementary criteria:

One is the objective criterion of the class and nature of the data processed, according to whether they are connected and refer to one sphere (the intimate and personal), or the other (the professional of the activity). And two, that of the purpose of the treatment and the circumstances in which it takes place, a criterion that would operate in those cases in which some of the professional data coincides with the private ones (for example coincidence of the housing for tourist use with the domicile usual of the individual entrepreneur).

The data protection legislation would not be applicable in cases where the data of the individual entrepreneur subjected to treatment refer solely to him in his capacity as a trader, that is, to his business activity. But the use of this data must be limited to these business activities. If the use of the data occurred in relation to a different area, it would be fully subject to the provisions of the LOPD.

As antecedents to the request for information, the claimant describes the problem in relation to the Shock Plan to combat illegal tourist use housing that motivates his inquiry and, within the framework of which he states that administrative procedures have been opened in an automated manner and procedures for the protection of legality and sanctioning procedures have been initiated "against natural persons who sporadically surrendered their usual and permanent accredited residence".

It would therefore, in many cases, be natural persons who would be carrying out commercial activities related to the exploitation of tourist accommodation, and in which the professional data would coincide with the private data due to the coincidence of the housing for tourist use with the usual address of the individual entrepreneur. In these cases, the communication of the address data of the business activity would allow, without disproportionate efforts, to identify the person sanctioned with the corresponding invasion in their personal sphere, with respect to data that in the context in which they want obtain they would have under the protection of the LOPD the consideration of specially protected.

Therefore, taking into account the nature of the information analyzed and the repercussions that its disclosure may have for the natural person who owns the establishment, this must be treated as personal information subject to the scope of application of the LOPD and consequently the limit of article 23 of the LTC would apply to these data.

On this issue, remember also that article 19.2 of the Draft Organic Law on the Protection of Personal Data, approved by the Council of Ministers on November 10, 2017, and published in the BOCG, Congress of Deputies Serie A Núm. 13-1 of November 24, 2017, although for obvious reasons it is not applicable, it does not exclude the data relating to individual entrepreneurs from the scope of application of the data protection legislation but enables in certain cases their treatment, when it establishes that:

"Article 19. Treatment of contact data and of individual entrepreneurs.

1. Unless proven otherwise, it will be presumed covered by the provisions of article 6.1 f) of Regulation (EU) 2016/679 the treatment of the contact data of physical persons who provide services in a legal entity provided that the siguientes requisites: a) That the treatment refers only to the data necessary for your professional location. b) That the purpose of the treatment is solely to maintain relations of any kind with the legal entity in which the affected party provides its services.

2. The same presumption will operate for the treatment of data relating to individual entrepreneurs when they refer to them only in that condition and are not treated to establish a relationship with them as natural persons."

IV

The limit of article 23 of the LTC with regard to the data relating to the commission of criminal or administrative infractions, except for those involving a public warning, will not apply when the express consent of the affected or when a rule with the status of law has expressly provided for its publication (art.15.1 LT).

The public reprimand is a type of administrative sanction provided for in the exercise of punitive powers over certain sectors of activity, while in other matters the sanctioning regulations provide for the publicity of the sanctions that are imposed. In this sense, the Supreme Court, among others by Order of October 2, 2015 (rec. 1003/2015), has determined that in these cases the legislator considers the concurrence of a public interest in making public the sanctions imposed, with the purpose that corresponds to each sector, publicity that, when it comes to the imposition of a public warning penalty on the offender, extends to the rest of the data relating to the commission of the offence.

Law 13/2002, of 21 June, on Tourism of Catalonia does not provide for the existence of public warning sanctions as a complement to the main sanctions established.

With regard to the publication of sanctions, the aforementioned Law 13/2002 establishes:

"Article 95

Evidence and publicity of sanctions 1. In

case of imposition of sanctions for serious or very serious infringements of this Law, the sanctioning body must communicate the corresponding firm resolution to the Tourism Registry of Catalonia, within the deadline ten days after being notified. Interested persons may request the cancellation of the registration of the penalty imposed, once two years have passed since the entry, without prejudice to the fact that the Registry itself may carry out the said cancellation ex officio.

2. In case of very serious infringements of this Law, the authority that has resolved the case may agree to publish the sanction, once it has become final in the administrative process, in anticipation of future infringing conduct.

3. If, as a result of the initiation of an administrative file, the infringement of this Law in the matter of advertising is sanctioned, the competent body may require the offenders to publish a statement in which the advertising carried out is rectified, publication that must be made under conditions and with means equal or similar to those in which the sanctioned action took place."

Thus, the Catalan tourism regulations provide that serious or mildly serious infringements are reported to the Catalan Tourism Register, with the possibility of cancellation of the corresponding registration after two years have passed since the entry, either at the request of the people interested or ex officio by the Registry itself.

It is necessary to take into account the functions that Law 13/2002 attributes to this register, thus article 73 provides:

"1. The Tourism Registry of Catalonia is an administrative body whose purpose is to carry out the registration function related to the organization and control of the tourism sector. It is also responsible for carrying out informative, statistical, certification and support activities for the bodies with competences related to the study and research in tourism matters.

2. The Tourism Registry of Catalonia is attached to the Administration of the Generalitat, by means of the general directorate competent in matters of tourism.

3. All companies and tourist establishments regulated by this law and the regulations that implement it are registered in the Catalan Tourism Register.

4. All companies, entities and establishments that develop activities of tourist interest in Catalonia can be registered in the Catalonia Tourism Register.

5. The registration number in the Tourism Registry of Catalonia of companies and tourist establishments must appear in all kinds of advertising that advertises them."

Therefore, according to the transcribed article, it is the responsibility of the Tourism of Catalonia register, in addition to the registration function, to carry out information and support activities for bodies with competences in the field of tourism. Consequently, the entry in the register of serious and very serious offences

it is not set up as public for citizens, but seems to have supporting effects for the bodies with competences in the field of tourism.

Only for very serious infringements is the possibility expressly foreseen for the body with sanctioning powers to agree to the publication of the sanction, in this case the legislator has considered the concurrence of a public interest in making the sanctions public with the deterrent purpose to avoid new violations in the future. It is articulated as an optional publicity of the sanctions that are imposed, which will not occur in all cases but only when the competent body so agrees.

In short, except for the cases in which the competent body agrees to the publication of very serious violations of the Tourism Law, it cannot be concluded that there is legal authorization that allows access to data relating to the tourism commission administrative infractions in this matter, and therefore unless the express and written consent of the affected person is obtained (art. 7 of the LOPD), the limit provided for in article 23 of the LTC will apply.

conclusion

Except for the address of the tourist accommodation subject to the proceedings initiated by the City Council, the information requested by the claimant does not contain personal data.

The data protection regulations do not prevent the delivery of the information on the number of procedures initiated referred to in sections a), b) and c) of precedent 3 of this report, nor to the address of the sanctioned tourist accommodations when the sanctioned subjects are legal entities.

When the holder of the accommodation for tourist use is a natural person individual entrepreneur and the circumstances set out in the report occur, the granting of access to the information relating to the address of the tourist accommodation sanctioned for breaches of Law 13/2002, of June 21, on tourism in Catalonia, would not be respectful of the right to the protection of personal data.

Barcelona, April 18, 2018