

IAI 24/2018

Claim: 159/2018

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 presented by a councilor against a city council for the denial of access to the outstanding debt of a restaurant due to the concept of occupation of the public road.

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 claims 159/2018 and 160/2018 presented by a councilor against a City Council .

Despite having requested a single report, as if it were two independent claims, which do not appear to have been accumulated and, given the different nature of the data requested, both requests are processed separately and the this report is issued with respect to claim 159/2018 relating to the denial of access to the outstanding debt of a restaurant due to the concept of occupation of the public road.

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 April 6, 2018 with entry registration no. 407, a councilor submitted a request to the city council asking for the following information to be provided: "the outstanding debt on 30/11/2017 of a restaurant, for the concept of occupation of the public road. We do not know to which particular name/s this debt is charged".
2. On May 8, 2018, the councilor filed a complaint with the GAIP in which he explained that he had asked the City Council for the information referred to in point 1 of these antecedents and that, given the lack of response, requests the GAIP to require the City Council to provide the requested information.
3. On May 16, 2018, the GAIP requests the city council to issue a report in relation to all the claims presented by the councilor against that city council, including the one that is the subject of this report. The report issued in this regard by the mayoress of the Aiguamúrcia City Council is included in the file.
4. On June 6, 2018, the GAIP sent to this Authority the claims with numbers 159/2018 and 160/2018 presented by the councilor against the city council and requested the issuance of a report in this regard. As has been explained, since these are two independent claims, which do not appear to have been accumulated and, given the different nature of the

data requested, both requests are processed separately and this report is issued with respect to claim 159/2018.

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.

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 affected persons, understood as "all information about an identified or identifiable natural person ("the interested party »); Any person whose identity can be determined, directly or indirectly, in particular by means of an identifier, such as a number, an identification number, location data, an online identifier or one or more elements of identity, shall be considered an identifiable physical person physical, physiological, genetic, psychological, economic, cultural or social of said person", in accordance with the definition of Regulation (EU) 2016/679 of the European Parliament and of the Council, of April 27, relating to the protection of natural persons with regard to the processing of personal data (hereinafter, RGPD), applicable from May 25, 2018 (article 99), in the same line of the LOPD, and the Implementing Regulation (RLOPD) -which were the applicable data protection rules at the time of submitting the information request-.

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.

Article 86 RGPD provides that "The personal data of official documents in the possession of some 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 of

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.”

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

Before analyzing the merits of the claim, it is appropriate to determine the legal system applicable to the request.

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 81/2016, 66/2016, 45/2016, 21/2016, 59/2015 and 50/2015, which can be consulted on the website www.apdcat.cat) the legal system recognizes a right of access to municipal councilors to that information that their corporation has and 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."

The recognition of the right of access to information is for all members of the local corporation, therefore, regardless of whether they are in the government team or in the opposition.

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".

However, this does not mean that this right of councilors is an absolute right. If it conflicts with other rights, it will be necessary to weigh the different rights at stake, in order to decide which should prevail and to what extent.

This has come to be recognized by the local regime legislation itself. The aforementioned article 164 of the TRLMRLC, in regulating the conditions for the exercise of the right of access to municipal information by the members of the corporations (sections 2 and 3), establishes, as a possible basis for denying the request with reasons 'information, that "the knowledge or dissemination of the information may violate the constitutional right to honor, personal or family privacy or one's own image" (section 3, letter a)), but obviously access could also be denied, when other fundamental rights may be affected such as the right to the protection of personal data.

Given that the exercise of the councilor's right of access could lead to a limitation of the fundamental right to the protection of personal data (Article 18.4 EC), it will be necessary to determine whether it is a proportional limitation, given that, according to repeated doctrine of the Constitutional Court, the limitation of fundamental rights can only occur in a proportionate manner (SSTC 11/1981, 57/1994, 66/1995, 11/2006, 206/2007, among others).

It should be borne in mind that the elected officials participate in a public action that manifests itself in a wide range of specific matters, such as the right to control the actions of the corporation, the control, analysis, study and information of the information necessary to carry out the tasks that have been entrusted to the corporation for the purposes of adopting decisions in the future (among others, STS of March 29, 2006).

In the case presented, it is necessary to analyze the specific information requested by the councilor, what are the regulatory provisions in relation to this information and its connection with the functions attributed to the councilors and carry out a weighting, in order to assess the implications that can have the exercise of the right of access to the information of the councilors, in the right to the protection of the personal data of the affected persons.

III

In his request, the councilor requests information on the outstanding debt due to the concept of occupation of the public road of a restaurant in the municipality, on November 30, 2017. It is stated in the request that this information is necessary for the development of his task as a councillor.

Although the request only refers to the economic data consisting of the debt contracted, the fact that it is related to a specific activity (occupancy rate of the public road of a specific restaurant) allows to identify, without great efforts, to the person holding it and link it with the data obtained.

According to the report issued by the mayor at the request of the GAIP, the owner of the activity is a natural person. Thus, information related to debts incurred by a natural person, regardless of the particular nature of these debts, is personal data subject to data protection regulations.

The LOPD (data protection regulations applicable at the time of the information request) considers transfer or communication of data "any disclosure of data made to a person other than the interested party" (art.3.i) .

In this regard, and in line with the criterion maintained by this Authority, the communication of personal data that may occur between the municipal administration and councilors who are part of a municipal group even though it could be considered, in one sense wide, as a "communication of data" in accordance with article 19.1 of Law 7/1985, of April 2, regulating the bases of the local regime (LRBRL), the government and the municipal administration corresponds to the City Council, - made up of the mayor and councillors-. The councilors are part of the City Council, and as such are not properly a third party "stranger" to the relationship between the natural persons holding the data and the City Council itself. However, the fact that this access to personal information is not considered a transfer of data, does not exclude that its treatment must be carried out with full respect for the principles established in the data protection regulations.

As we have seen, the information requested is related to the management and collection of income by the governing bodies and the municipal administration. In this sense, it will be necessary to analyze what are the regulatory provisions in relation to the functions entrusted to councilors in this matter. Thus, it must be taken into consideration that the full body of the corporation is assigned, among other functions, the control and supervision of the governing bodies (art. 22.1.a) LRBRL.

In budgetary matters, the Plenary is responsible for approving the budget and its modifications (art. 22.2.f) TRLBRL and arts. 168 and 169 of the Royal Legislative Decree 2/2004, of March 5, which approves the revised text of the Local Treasury Regulatory Law (TRLRHL). Throughout the budget year and in compliance with the provisions of article 207 of the TRLRHL and rules 105 and 106 of the ICAL, within the following quarter, after the accrual of each calendar quarter, the Comptroller General must send to the 'Mayor's Office or the Presidency of the Economic Information Commission which will report to the Plenary, information on the execution of the budgets and the movement of the treasury and the independent and auxiliary budgetary operations of the budget. Specifically, and with regard to the state of income, this information must

provide the amounts corresponding to the initial income forecasts, their modifications, and the final forecasts and recognized net rights, as well as the net collection.

Likewise, the Plenary is responsible for approving the corporation's General Account, drawn up by the Comptroller and subject to a report by the entity's Special Accounts Committee, made up of members of the corporation's various political groups. (art. 212.4 TRLHL). The general account reflects the economic, financial and patrimonial situation, the economic and patrimonial results, and the execution and liquidation of the budgets.

The income budget settlement statement provides information on the concept of budgeted income, distinguishing between initial and final forecasts, the amount of collection rights, canceled rights (rights recognized in the financial year that have been canceled due to deferrals or installments of payment, cancellation of settlements or refunds of undue income that have been paid that year), canceled rights, because they have been collected in kind or because the debtor has resulted in being insolvent, the net rights recognized, and the rights pending collection at December 31 (amount of the rights recognized in the financial year that have not been collected). In short, it reports on how the budget has been executed and contains information necessary to know the amount of resources that have been obtained during the year and where they come from.

Placed in the context of the retention of public accounts, it is worth noting that access by councilors to information related to the income statement could be requested within the special commission of accounts (obligatory in all the municipalities and formed by members of the different political groups that make up the corporation), by way of articles 212.2 TRLHL and 58 TRLMLC, but also by way of article 212.4 TRLHL in relation to article 77.2 a) LRBRL.

For the exercise of the functions of control and inspection of the governing bodies, in relation to the role of political control that the regulations attribute to the plenary session of the corporation, to whom it corresponds, in the last instance, the approval of the general account, the councilors must be able to dispose of the information, data, accounting documentation and justification of the different statements of the accounts, which allows them to evaluate what has been the action of the municipal administration, with respect to the rights recognized in favor of the corporation that are recorded as pending collection, as well as rights recognized and subsequently annulled or cancelled.

The action of the governing bodies and the municipal administration in matters of management and collection of public revenues directly affects the execution of the revenue budget and the general statement of accounts, and the result of this action has repercussions in the budgetary and economic situation of the corporation, therefore the councilors must be able to verify the monitoring and control that the governing bodies and the municipal administration carry out on the balances pending collection whatever the origin of the debt.

In general, it can be concluded that information related to a person's debts is information of an economic nature that may affect their socio-economic sphere, but that does not constitute intimate, sensitive information, or that deserves special protection to effects of data protection legislation.

With respect to the data related to debts of a tax nature, such as the debt corresponding to the fee for the use of the public road, it is necessary to take into account the special treatment provided by the regulations regarding personal tax data.

The local tax authorities have, for the collection of taxes and other revenues under public law, the same prerogatives that Law 58/2003, of 17 December, General Tax attributes to the State Treasury.

In this sense, article 95 of the LGT establishes a detailed regulation of the reserved nature of tax data, as follows:

"1. The data, reports or antecedents obtained by the tax administration in the performance of its functions are reserved and can only be used for the effective application of the taxes or resources whose management is entrusted and for the imposition of the sanctions that are appropriate, without being able to be transferred or communicated to third parties, unless the purpose of the transfer is: (...)

3. The tax administration must adopt the necessary measures to guarantee the confidentiality of tax information and its appropriate use.

All authorities or officials who have knowledge of these data, reports or antecedents are obliged to the strictest and complete secrecy with respect to them, except in the cases mentioned. (...)"

It is clear, then, that the LGT protects certain information related to tax payers, and conditions its access and treatment to certain purposes. Consequently, from this precept it can be understood that the data subjected to treatment for purposes of tax significance could only be accessible by the organs of the municipal corporation that have powers in this matter, without, therefore, being able to be used by other organs or dependencies, except in those cases in which a law would cover this treatment.

The use of certain tax information for purposes other than those provided for in tax legislation has been analyzed by this Authority, among others, in opinions CNS 7/2017, CNS 21/2016 and 33/2012. Despite the fact that in these opinions it is concluded that there would not be sufficient legal authorization to consider that municipal councilors can have generalized access to all the personal data contained in a tax register, with identification of all the people affected; from the perspective of the principle of data quality in those opinions, the possibility of giving the information to councilors in a dissociated or anonymized form was considered, if this possibility did not distort the legitimate purpose provided for by the LRBRL and the rest of the aforementioned regulations in relation to councilors.

Likewise, these opinions also provided for the possibility that, in certain cases, depending on what specific information the councilor requests, and the legitimate purpose intended with the access request, the data protection regulations could enable the access to certain data included in the municipal tax information, referring to certain people or certain properties, when necessary for the development of the control functions of the activities of the Municipal Corporation, in the terms provided for in the LRBRL.

Thus, in the case at hand, the only data requested by the councilor is the financial data of the outstanding debt. The information requested may be relevant to the exercise of the control functions attributed by the councilor in his request, especially if it is taken into consideration that it is a small municipality, and that the taxable event of the tax is the private use and occupation of the public road, since any activity in a small municipality has a clear impact on municipal management.

Therefore, from the perspective of the control of administrative action in the field of management and collection of recognized rights in favor of the corporation, in order to be able to detect if any irregularity has occurred in the field of this activity, the responsibility of which corresponds in any case to the governing bodies of the corporation, access to the data of a debtor for the concept of occupation of the public road, as stated in the sole legality, it is part of the legitimate functions of control and inspection legitimately attributed to councilors.

On the other hand, in this case it does not seem that the anonymization of the information would make sense. Not only because of the ease with which the affected person could also end up being identified, but because of the individualization and limited nature of the information requested, as well as the concurrent circumstances (private use of the public road).

Having said that, and under the protection of the purpose principle, the processing of the data to which the councilor has access cannot have any other purpose than the strict fulfillment of the specific control function that they have been assigned.

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Finally, it should be remembered that whenever the councilors' access to personal data is carried out due to the functions entrusted to them as such, they must be governed, apart from the duty of reservation imposed by the regime regulations local (article 164.6 TRLMRLC), and for the duty of secrecy (article 10) established in the LOPD.

Thus, article 164.6 of the TRLMRLC provides: "the 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."

Therefore, if the subsequent use of the information to which the councilor would have accessed by reason of his position involved disclosing the personal data contained therein to third parties, without the consent of the affected person or the corresponding legal authorization (article 11 LOPD), we could also find ourselves faced with an action not adjusted to data protection regulations, even though the access was originally considered legitimate.

Likewise, in relation to the duty of secrecy, as provided for in the Penal Code (articles 197 and 198), the authority or public official who, outside of the cases permitted by law and by virtue of his position, disseminates, reveals or transfer certain data to third parties, it would be carrying out conduct that could constitute the crime of discovery and disclosure of secrets.

conclusion

The data protection regulations do not prevent the councilor's access to the information on the outstanding debts, as of November 30, 2017, in respect of a restaurant in the concept of occupation of the public road, referred to in the sole request

Barcelona, June 19, 2018