

Ref. : IAI 25/2018

**Claim: 165/2018**

**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 against a City Council for the denial of access to information about a selective process.**

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 the claim presented against a City Council for the denial of access to information on a selective process.

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, a person participating in a selection process for the provision of two local police sergeant positions, through the competition-opposition system through internal promotion, requests the City Council, the following documents:

1. Copy of the technical report of the psychotechnical test (test B), and profile of all the candidates.
2. Copy of the psychologist's technical report of the interview (exhibit C) of all candidates. 3. Assessment and evaluation items for test C (interview).
4. Copy of test D (case study).
5. Copy of test D of all candidates (practical case answer of each of them). 6. Items or specific evaluation guidelines established by the Court for test D (case practical).
7. Differentiated score of each member of the Court in test D (practical case) for evaluation. 8. Items or evaluation guidelines for test E (defense of the practical case).
9. Differentiated score of each member of the Court in test E (defense of case study).
10. Copy of all the acts of the Court.

2. On April 18, 2018, the Qualifying Court agreed to consider the request regarding the copy of test D (practical case) and the exercises carried out by the candidates (points 4 and 5); copy of the evaluation items established by the Court for test D (case study) (point 6), and for test E (defense of the case study) (point 8), as well as a copy of all the Court's minutes ( point 10).

The Court dismisses the request regarding the copy of the technical report of the psychotechnic test (test B) and profile adjustment of all candidates (point 1), the copy of the technical report of the psychologist of the psychological assessment interview of all candidates (test C) and the assessment items of this test (points 2 and 3), citing among other reasons the particularly protected nature of the requested personal data.

The Court also rejects the request for documentation relating to the different scores of each of the members of the Court in test D (case study) and in test E (defense of the case study) (points 7 and 9), alleging that there have been no votes against or abstention and that the evaluations carried out correspond to the unanimous opinion of all the members.

3. On April 27, 2018, the interested party submits a claim to the GAIP in which he requests access and a copy of the file, specifically specifying the list of documents he requests and that match the previously tendered at the City Council.

4. On June 18, 2018, the City Council sent the GAIP a report on its position in relation to the complaint presented, as well as various additional documentation contained in the selection file that is the subject of the complaint.

5. On June 22, 2018, the GAIP requests 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.

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 Deployment Regulation (RLOPD), defines personal data 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;

"

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

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

The first additional provision of Law 19/2014 establishes that the access of interested persons to administrative procedures in progress is governed by what is determined by the legislation on legal regime and administrative procedure.

The person requesting access is one of the participants in the selection process, and to the extent that he may be affected by the result thereof, he has the status of an interested person (article 4 of Law 39/2015, of 1 October, of the common administrative procedure of public administrations (hereinafter, LPACAP)).

On the other hand, at the time when access is requested (April 6, 2018), the procedure had not yet ended (according to the file, the procedure ends with Resolution 3524/2018, of May 11, 2018 of the Deputy Mayor, with the approval of the proceedings of the Qualifying Court and the appointment of the two applicants who achieved the highest score).

It is also stated in the file that the claimant filed an appeal on May 23, 2018 in which he requests that the validation of the results of test C (psychological evaluation interview) be annulled, the scores awarded to the applicants being reviewed and the annulment of the agreement of April 23, 2018, by which the Qualifying Court proposes to the two applicants who have achieved the highest score.

Therefore, it is considered that the administrative procedure regulations apply, without prejudice to the fact that the interested person must be granted at least the same guarantees regarding access to information - including the possibility of lodge a complaint with the GAIP - than the rest of citizens who do not have this condition, given the supplementary application of Law 19/2014 (paragraph 2 of DA 1a).

Even so, it can also be advanced that, with regard to the incidence of the right to data protection in the substance of the claim, given the terms in which article 15 of Law 19/2013 and articles 23 and 24 of Law 19/2014 regulate the limit derived from the right to the protection of personal data, in the specific case being analyzed the conclusions of this report would not differ substantially if the transparency regime were applied.

Likewise, it should be noted that although the new RGDPD applies from May 25, 2018, in this case the LOPD governs - regulations in force at the time of formulating the access request (6 of April 2018)-. It should be borne in mind, however, that the conclusions of this report would not vary if the new European regulation were the standard of reference.

Article 4 RGDPD considers "treatment": "any operation or set of operations carried out on personal data or sets of personal data, whether by automated procedures or not, such as collection, registration, organization, structuring, conservation, adaptation or modification, extraction, consultation, use, communication by transmission, diffusion or any other form of enabling access, comparison or interconnection, limitation, deletion or destruction."

Art.5.1.a) RGDPD establishes that all processing of personal data must be lawful, loyal and transparent in relation to the interested party ("lawfulness, loyalty and transparency"). In order for this treatment to be lawful, one of the conditions of article 6 RGDPD must be met, or in the case of specially protected data that are called "special categories of data" it is necessary to comply with the provisions Article 9 GDPR.

Paragraph 1 of article 9 RGDPD establishes:

"the processing of data that reveals ethnic or racial origin, political opinions, religious or philosophical convictions, or trade union affiliation is prohibited, and the processing of genetic data, biometric data aimed at uniquely identifying a natural person, data relating to the health or data relating to the sexual life or sexual orientation of a natural person."

It is established in general, the prohibition of the treatments that reveal personal data of this type except that the specific situations provided for in the same regulation occur. Section 2 of article 9 RGDPD lists the circumstances that, if they occur, would allow this treatment, establishing a "numerus clausus" of treatment possibilities.

### III

Article 53.a) of the LPACAP provides that interested persons have the right to access and obtain copies of the documents contained in the procedures in which they have this condition.

For its part, article 26 of Law 26/2010, of August 3, on the legal regime and procedure of

the public administrations of Catalonia, also establishes that "citizens who have the status of persons interested in an administrative procedure in progress have the right to access the file and obtain a copy of the documents that are part of it. If the documents are in electronic format, citizens have the right to obtain electronic copies."

Therefore, the applicable administrative procedure legislation recognizes the right of interested persons to access the information contained in the procedure and to obtain copies of it in fairly broad terms. On the other hand, the interested parties have the right to use the resources provided for by the legal system regarding the administrative decisions that affect them.

This does not mean, however, that this right of access is an absolute right. It should be borne in mind that if it comes into conflict with other rights, as in this case it could be the fundamental right to the protection of personal data (Article 18.4 CE), it will be necessary to weigh up the different rights at stake, in order to decide which must prevail and to what extent.

This is, in fact, recognized by article 82.1 of the aforementioned LPACAP by establishing that the obtaining of copies or access to the file of the persons interested in the hearing procedure must take into account the limitations provided for in the transparency legislation.

In the same vein, article 51 of Law 26/2010, in regulating the hearing procedure, establishes that the possibility of accessing the file by interested persons will not affect "the data excluded from the right of "access".

Therefore, although in principle the regulations on procedure recognize in fairly broad terms the right of access of interested persons, to the extent that this right of access would lead to a limitation of the fundamental right to the protection of personal data of other people than the applicant, it will be necessary to see if it is a proportionate limitation, given that according to repeated doctrine of the Constitutional Court, the limitation of fundamental rights can only occur in a proportionate manner (SSTC 11/81 57/94 ,66/95, 48/05 206/07, 11/06, 206/07, among others).

From here, and given that the object of the claim affects various specific documentation related to the opposition phase of the procedure in which the person making the claim participates, it will be necessary to see the type of documents requested, if they contain personal information, and if so, the nature of the data that would be affected.

Thus, initially, from the point of view of data protection, there would be no disadvantage in facilitating access (and copy) of the person claiming to that information or documentation of the file of the said selective process in which do not contain personal data. This type of non-personal information would include the statement of the practical case (test D), as well as the Items or specific evaluation guidelines applied by the Court in the different tests.

There would also be no disadvantage in facilitating the claimant's access to that information about him contained in the documents that make up the file, such as his exercises and the assessments obtained.

In this sense, note that, in accordance with article 15 of the LOPD:

- "1. The interested party has the right to request and obtain free of charge information about their personal data being processed, the origin of the data and the communications made or planned to be made.
2. The information can be obtained through the mere consultation of the data through visualization, or the indication of the data that is the subject of treatment through writing, copy, telecopy or photocopy, certified or not, in a legible and intelligible form legible, without using keys or codes that require the use of specific mechanical devices. 3.(...)"

Article 15 RGD recognizes and regulates the interested party's right of access to their data: "1. The interested party shall have the right to obtain from the person responsible for the treatment confirmation of whether or not personal data concerning them is being processed and , in such case, right of access to personal data (...)"

Beyond this, and with respect to information relating to third parties (other participants), it is necessary to analyze the nature of the personal information that would be affected by access to the documents requested by the claimant. Since it appears in the file, that there is a large part of the requested documents that has already been provided (documents 4, 5, 6, 8 and 10 of the request), we will focus the analysis on documents I access to which has been denied by the City Council:

- Documents 1, 2, and 3 relating to the technical evaluation reports of the psychotechnical test and the psychological evaluation interview (tests B and C), as well as the evaluation items or guidelines)
- Documents 7 and 9 relating to the different scores of each of the Court members in the practical case test and the practical case defense test (tests D and E).

#### IV

Access to documents 1, 2, and 3 relating to the technical evaluation reports of the psychotechnical test and the psychological evaluation interview (tests B and C), as well as the evaluation items or guidelines).

The bases for the competition-opposition call approved by the Local Government Board Agreement contained in the file, include in the opposition phase (eighth base), the performance of a psychotechnical test (test B) , and a psychological assessment interview (test C).

According to this basis, the psychotechnical test consists of two test-type exercises, and is mandatory and eliminatory, with a pass or fail result. It consists in the assessment of the personality traits and the psychological state and the skills of the aspirant, with the aim of accrediting the

leadership skills, influence in the group and other factors considered relevant for the job in accordance with Resolution INT/2403/2015, of October 2 of the Department of the Interior, which establishes the orientation criteria for psychological assessment for access, promotion and mobility of the local police in Catalonia.

Resolution INT/2043/2015 of October 2nd, by which publicity is given to the protocol that establishes the psychological assessment guidelines for access, promotion and mobility of local police officers in Catalonia, aims to explore the candidate's profile in the aptitude field (it must provide information on the set of cognitive processes that are required to quickly solve problems, capture data, discover underlying relationships or laws, maintain adequate mental flexibility and make logical processes of induction or deduction), the personality (must provide information on the dynamic set of cognitive, conative, emotional and biophysical processes that explain their behavior pattern, as well as on the dispositional variables most directly related to professional skills, and especially with the personal and social skills required to perform the police function), and the psychological state of the candidate (must provide information on possible psychopathological alterations due to their difficulties in adapting to the personal, social and work environment.)

In Minutes number 3 of the Qualifying Court, approving and validating the results of test B, it is stated that "the sources of information on which the technical judgment of the Court operates" are the results of the compeTEA Ediciones and CTC questionnaires, objective tests related to personality traits and psychological state and to the competencies relevant to the workplace that meet the requirements of validity and reliability to assess the competencies and command skills associated with the hierarchical scale and the profile of the job required. "

At the same time, it is noted that the qualitative assessment criteria used to issue this technical judgment are, among others, leadership skills, influence in the group and other factors considered relevant for the sub-inspector category, of in accordance with Decree 233/2002, of 25 November, which approves the Regulation on access, promotion and mobility of the local police of Catalonia and Resolution INT 2403/2015. In the minutes it is also made clear that the cut-off score for candidates to be considered suitable is a score higher than 70 out of 100 in the first year and lower than 70 in the second year.

The technical report on the results obtained by the candidates in the two psychotechnical tests carried out and the adjustment of the profile of each of the candidates, would offer information on the personality traits and the psychological state, which are data relating to health ( article 4. f) RGPD and art. 5.1.g) RLOPD ) and as such deserving of special protection. Article 7.3 of the LOPD only authorizes the communication to third parties of data relating to people's health when, for reasons of general interest, a law so provides, or the affected person expressly consents.

In the absence of this express consent of those affected, and beyond the qualification of suitable or not suitable, it is not possible to provide this information.

The purpose of the interview is to integrate all the elements explored in the psychotechnical test, and to deepen individually the personal traits and skills assessed. To the extent that the interview is intended to carry out a psychological assessment of the candidate and delve into personal traits, it is foreseeable that the assessment report carried out by the psychologist technician following these interviews will include an assessment of certain traits or aspects of the candidate's personality and psychological state (health data deserving of special

protection), access to which must be limited, unless the express consent of the affected person is obtained (article 7.3 LOPD). In fact, this is one of the reasons why the City Council denies access to the claimant.

Apart from the data that may be related to the candidates' health, it cannot be ruled out that the interview evaluation report may also contain other specially protected data (such as those relating to ideology, sexual orientation, etc. .) of restricted access, as well as other sensitive information that could affect the person's privacy.

The file contains an appeal (document no. 17) presented by the claimant against the final agreement of the Qualifying Tribunal in which the appointment of two candidates as trainee civil servants is proposed. The appellant requests the annulment of the validation of the results of test C (interview) and the revision of scores obtained by the candidates, alleging the existence of a clear arbitrariness in the attribution of these scores. In this sense, he argues that these are not in line with what was established in the basis of the call, Decree 233/2002, and Resolution INT/2403/2015 because they do not correspond to objective assessment criteria, and adds to the fact that he has not been given the information on the report or the evaluation items of this test, violating the right of those interested to access the file (article 53.a) LRPAC).

It should be borne in mind that the Qualifying Courts are specific bodies responsible for the development and grading of the selective tests that make up the opposition phase, and to that end, they have a margin of technical discretion, which must be understood as the faculty of subjective appreciation to evaluate based on their scientific or technical knowledge, the answers given by the people who participate in the selective procedure. Thus, it is up to the Court, within the framework of the rules of the call, to set the evaluation criteria for the tests carried out. This evaluation must be done, however, respecting the selective procedure regulated in the call.

The claimant has a copy of all the acts of the Qualifying Court. Specifically, Minutes number 11 on "competition phase evaluation, qualifications, list of passers and proposals" includes a list with the opposition phase plus the validation of results, which includes the details of the scores for each candidate of the eliminatory tests of the opposition phase, including the grade obtained in test C (interview). The different candidates are identified in this list with a numerical code. Even so, a second list is included, where the first and last names of the different approved candidates appear with the final result obtained by each of them, so that the claimant can relate the interview score to the first and last name of each approved candidate.

In addition to the scores obtained by the different candidates, in the exercise of the right of defence, and for the purposes of being able to verify any arbitrary actions of the qualifying body contrary to the principles of equality, merit, capacity and transparency, which must govern in any procedure of this type, the claimant must be able to use the different evaluation criteria that the Court has set in order to make the psychological assessment of the candidate.

Point 7 of Resolution INT/2403/2015 provides that the report of results obtained in the psychotechnical tests and personal interview, consists of two documents: In the first, "the general procedure, the objective of the evaluation and the methodology used", and in the second, is



they detail the results obtained through a list of the people evaluated, with the rating of fit or not.”

The information in the first document seems to coincide with the assessment items requested by the claimant in point 3 of the request, and which does not appear to have been provided. To the extent that the technical evaluation reports for tests B or C contain a first part where the general procedure, the evaluation objective and the methodology used are set out, this is information that would not affect the personal data of the candidates and access to said information would not pose any inconvenience for the purposes of the personal data protection regulations.

Beyond this, the detailed assessment that the psychologist technician can make on the different elements of the personality provided by the candidate in the interview (which may include the report), is subjective and would fall within the margin of technical discretion that it is attributed to him as an expert, and therefore, in principle, he should not be subject to access. With respect to that information that does not have the character of being specially protected, it must be taken into account that the performance of both tests (psychotechnical tests and interview) aims to ultimately evaluate the socio-psychological profile of the candidate in order to ensure that this fits the profile required to carry out the duties of a police sergeant. The disclosure of this information would be a very invasive measure of the privacy of the people affected, which can affect both the unfolding of their lives in the personal sphere, as well as in the social or professional sphere.

For all this, it is concluded that while there would be no problem in providing information on the criteria or assessment items set for the evaluation of the psychotechnical tests and personal interview, access to the personal information that may contain the technical evaluation reports on these psychological evaluation tests of the different candidates, would only remain justified with respect to the data referred to the same candidate making claim. On the other hand, it would be necessary to limit access to the personal information of the rest of the candidates, under the protection of article 7.3 LOPD.

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Regarding the access to the differentiated scores proposed by each of the members of the Court in test D (case study) and in test E (defense of the case study) the City Council states in the report issued to the GAIP that the decisions of the Court have been adopted unanimously, but in the event that they had existed, it cannot be ruled out that it is necessary information for the purposes of being able to verify the different appreciation of the members of the Court when assessing the exercise carried out by the candidate, and to the extent that this was the case, access to this information would be protected by the right of access to the file, without data protection regulations being able to impose a limitation in this respect.

To this end, it must be borne in mind that it is not possible to generalize and establish that access to this type of information must be given in order to guarantee the transparency of public authorities in decision-making (proof of this is the STJUE of June 29, 2010, issued in case C-28/08 P, "Bavarian Lager" case). Everything will depend on the weighting that needs to be done in each specific case, and on the need to obtain personal information by the person requesting it.

It is worth saying, however, that the claimant has already obtained the information he requested, given that by telling him that the decision was adopted unanimously, he has already been given an answer to his claim, which is to know the opinion of each of the members that make up the Court in the assessment of the exercise carried out.

### **conclusion**

The data protection regulations enable access by the claimant to their own personal information that may be included in the technical assessment reports of the psychotechnical test and the psychological assessment interview (article 15 LOPD). On the other hand, it would prevent access to this same information referring to the rest of the candidates participating in the selection process under the protection of article 7.3 LOPD.

There would be no problem in providing the claimant with access to the items or evaluation criteria set by the Qualification Tribunal for their score, as well as to the different scores given by each of its members in the practical case tests, if not had been adopted unanimously.

Barcelona, July 18, 2018