

IAI 26/2018

**Claim: 226/2018**

**Report issued at the request of the Commission for the Guarantee of the Right of Access to Information Public in relation to the claim submitted by a citizen for the denial of access to information related to certain inspection actions of a Department of the Administration of the Generalitat de Catalunya**

The Commission for Guaranteeing the Right of Access to Public Information (GAIP) asks the Catalan Data Protection Authority (APDCAT) to issue a report on claim 226/2018 presented by a citizen against the Department (...) in relation to the denial of access to information related to certain inspection actions carried out by this Department during the period of time between 1/9/2017 and 1/5/2018.

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 May 2, 2018, a citizen submitted a letter to the Department (...) in which he requested access to information related to certain inspection actions carried out by this Department.

Specifically, and from the resolution of your access request, you request:

- Access to the file opened by the Education Inspectorate of the Department of Education on an Institute, which in any case includes the report drawn up by the inspector as his resolution, if it exists, and all the attached documentation, with the prior dissociation of the personal data that may be included.
- A list of all the requests received from the Ministry of Education, Culture and Sport and/or the High Inspectorate of Education to inspect facts that allegedly occurred from 1/9/2017 to 1/5/2018, with indication of:
  - a) The object.
  - b) The date.
  - c) The center or centers affected.
  - d) If a file has been opened and the status of its processing.
  - e) If the file has been resolved positively or the file has been agreed upon.
- Access to the files, with all the documentation they include, the resolution of which has been notified to the Ministry of Education, Culture and Sport and/or the High Inspectorate of Education from 1/10/2017 to 1/5/2018, with the prior dissociation of the personal data that may be included.

2. On June 1, 2018, the general secretary of the Department (...) issues a resolution by which it is agreed:

- Inform the applicant that no disciplinary proceedings have been initiated against the Institute.
- Deny access to the report carried out by the Education Inspectorate regarding the Institute, given which contains specially protected personal data.
- Inform the applicant, in relation to the requirements received from the Ministry of Education, Culture and Sport, which:
  - a) Three requests have been received, on 29/9/2017, 10/10/2017 and 31/10/2017. b) The object was the same in the three requirements: "to proceed to restore the violated rights and clear the responsibilities among those responsible, as stipulated in the referenced basic regulations, by virtue of the observations indicated in the body of this writing. " c) No disciplinary proceedings have been initiated as a result of these requirements.
  - d) Deny access to the requests received, given that they contain particular data protected

3. On June 25, 2018, the citizen filed a complaint with the GAIP against the Department (...) for not providing the public information requested in full.

In the statement of allegations that accompanies it, it expresses its disagreement with the reasons adduced by the Department for denying access to the report of the Education Inspectorate and to the requirements received from the Ministry, given that in its request for access explicitly requested that the information be facilitated prior to the dissociation of personal data.

4. On June 6, 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.

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), along the same lines as 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" (article 4.1) RGPD).

Therefore, any other limit or aspect that does not affect the personal data contained in the requested information is outside the scope of this report, as would be the case of the limit established in article 21.1.b) of the LTC, relating to the investigation or sanction of criminal, administrative or disciplinary offences, the application of which could lead to the claimant's right of access being denied or restricted.

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.

## II

Before analyzing the merits of the claim, it should be noted that, although the RGPD has been fully applicable since May 25, 2018 (article 99), in this case it is governed by the LOPD and its Implementing Regulations ( RLOPD), given that this was the current regulation at the time the access request was made (May 2, 2018).

Point out, however, that the conclusions of this report would not vary if the new European regulation were the standard of reference.

Article 4.2) of the RGPD considers "treatment": any operation or set of operations carried out on personal data or sets of personal data, either 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."

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

However, the RGPD applies "to the total or partially automated processing of personal data, as well as to the non-automated processing of personal data contained or intended to be included in a file" (article 2.1), meaning by personal data "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" (article 4.1)).

Consequently, the RGPD does not affect the treatment of anonymous information, that is "information that is not related to an identified or identifiable natural person", nor "to the data converted into anonymous so that the interested party is not identifiable" ( considering 26).

### III

The complaint is lodged against the denial of access to certain information related to various inspection actions of the Department (...), specifically:

- The report issued by the Education Inspectorate regarding the Institute.
- A list of the requests received between 1/10/2017 and 1/5/2018 from the Ministry of Education, Culture and Sport, indicating: the date, the object, the affected center, if any whether or not a file has been opened, the processing status of the file and whether a decision has been issued or whether it has been archived.
- The requirements in question.

Obviously, from the point of view of data protection, there would be no inconvenience in facilitating access to that information that cannot be qualified as information of a personal nature (article 3.a) LOPD), such as the relationship of requirements from the Ministry, given that, in this case and due to the information available, no personal data would be included.

In fact, it appears in the file that this relationship would have already been provided by the Department to the applicant, albeit incompletely, given that the information relating to the educational center was not included.

It should be noted, with respect to the omission of this data, that the information relating to legal entities remains outside the scope of protection of the data protection regulations (article 1 LOPD), so from the point of view of the regulations for the protection of personal data there would be no inconvenience for the applicant to be facilitated.

Regarding the Education Inspection report and the requirements of the Ministry of Education, Culture and Sport, despite not knowing its content, it can be understood that it may contain personal data, both of the public employees who have intervened in the preparation of these documents in the exercise of their functions, as well as of other people (as the case may be, of the investigated subjects, witnesses, whistleblowers, etc.).

Therefore, in general, these data may only be communicated to a third party for the fulfillment of the purpose directly related to the legitimate functions of the assignor and assignee, with the prior consent of the interested party. However, in accordance with article 11.2

a) of the LOPD will be the transfer of data, without the consent of the interested party, when this transfer is protected by a rule with the rank of law.

Article 18 of Law 19/2014 of December 29, 2014, on transparency, access to information and good governance (hereafter, LTC), establishes that "people have the right to access public information, referred to in article 2.b, in an individual capacity or in the name and representation of any legally constituted legal person" (section 1).

Article 2.b) of the LTC 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 that 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 (public information) .

However, in accordance with article 20 et seq. of the LTC, 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 persons would justify the limitation of the right of access to public information regulated in the LTC that invokes the requesting person.

#### IV

Article 23 of the LTC states that "requests for access to public information must be denied if the information sought contains particularly 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 the present case, the applicant is requesting the report issued by the Education Inspectorate regarding the Institute which, according to the file, would have been carried out to investigate events that allegedly occurred in this institute after 1 October 2017 and that could constitute criminal or administrative offences.

In this report, apart from the identification data (name, surname and position) of the education inspector, there will be personal information about the person or persons investigated as allegedly responsible for these events (the teaching staff). It is also likely that other people will be identified, such as those who have testified as witnesses or even the person or people reporting the allegedly irregular events. Some of these people could be minors. Despite not having this information considered a special category of data, it is obvious that the principle of preferential protection of the interest of the minor requires special care when it comes to data relating to minors. And this both because of his situation of special vulnerability, and the consequences that can be derived from it in the process of training and development of his personality and which can affect him for the rest of his life.

Likewise, it cannot be ruled out that the report contains other information deserving of special protection of some of the affected persons, such as data relating to their ideology (article 7.2 LOPD).

The applicant also requests the requirements of the Ministry of Education, Culture and Sport, in which, according to the file, the Department is urged (...) to "proceed to restore the violated rights and purify responsibilities between those responsible, as stipulated in the referenced basic regulations, by virtue of the observations indicated in the body of this letter."

Apart from the identification data (name, surname and position) of the public employee of the Ministry making the request, it cannot be ruled out that, as part of "the observations noted in the body of the present writing", there are other personal data, such as the identity of the person or persons allegedly responsible for the facts referred to by the Ministry in its writings or the identity of the person who brought these allegedly irregular facts to the attention of the Ministry. In any case, taking into account the nature of the request, it would be real information to the possible commission of administrative infractions.

The LTC excludes the possibility of accessing information deserving of special protection as well as information referring to the commission of criminal or administrative infractions, unless the sanction or penalty entails a public reprimand to the offender or have the express consent of those affected at the time of formulating the request. It is not recorded that this consent was provided in the present case.

Therefore, it is not appropriate to give access to the personal information contained in the Education Inspection report and the requirements in question relating to ideology or the commission of possible administrative or criminal offences, on the basis of what is provided for in the article 23 of the LTC.

Having said that, it must be borne in mind that, both in the request for access and in the claim, the applicant expressly indicates that access occurs with the prior dissociation of the personal data that may be incorporated in these documents.

Facilitate access to public information prior to dissociation of the personal data contained therein (the anonymization referred to in the new RGPD), so that it is not possible to identify the persons affected either directly or indirectly (Article 5.1. e) RLOPD), is, in fact, an option expressly provided for in the transparency regulations.

Thus, article 15 of Law 19/2013 establishes that:

"4. What is established in the previous sections will not be applicable if access is effected prior to the dissociation of personal data in a way that prevents the identification of the affected persons."

In fact, it should be understood, in the resolution of access requests, that this option - the prior dissociation of personal data or anonymization - should be the general rule, as long as the personal data were not relevant to satisfy the public or private interest that motivates access to the information in question.

This is a consequence of the application of the principle of data minimization provided for in article 4 of the LOPD, to which any data processing must conform, including those that derive from compliance with the provisions established in legislation on transparency.

The purpose of the transparency legislation is to establish a relationship system between people and the public administration and other obliged subjects, based on knowledge of public activity, the encouragement of citizen participation, the improvement of the quality of public information and administrative management and the guarantee of retention of accounts and responsibility in public management (article 1.2 LTC).

In this context, obtaining information on the research actions carried out by the Department (...) should be used to evaluate the management carried out by it in the exercise of its functions of inspection of the educational system, which include supervision, the advice and assessment of educational centers and services, for the purposes of ensuring the application of the regulations and guaranteeing the exercise of the rights and the fulfillment of the duties arising from them (article 178 Law 12/2009, of 10 of July, of education).

The fact that, in the present case, the applicant identifies himself as a journalist and expressly states that he wants to access the report and the requirements without the personal data that may be contained in it seems to demonstrate that what is intended with the 'access to this public information is to be able to evaluate the management carried out by the Department (...) in relation to events that allegedly occurred in certain educational centers during the period of time specified in your request and of which various media they would have echoed it. Therefore, it seems that he is interested in knowing what actions the Department undertook in this regard, either on its own initiative or at the request of the Ministry, how they developed and what was the result.

For the purposes of achieving this purpose of evaluating the management carried out by the Department and guaranteeing the retention of accounts, it is irrelevant to know the identity of the people who may appear in the report of the Education Inspectorate or, if this is the case, in the requests made by the Ministry, either as investigated subjects, complainants or witnesses. Therefore, by application of the minimization principle, this information should not be provided either.

On the contrary, it could be relevant to know the identity of the education inspector, as well as the public employee of the Ministry who sign the controversial documentation.

The applicant's access only to this personal information, it must be said, would not, in general, pose problems from the point of view of data protection, in accordance with the provisions of article 24.1 of LTC, according to which:

"1. Access to public information must be given if it is information directly related to the organization, operation or public activity of the Administration that contains merely identifying personal data unless, exceptionally, in the specific case it has to prevail over the protection of personal data or other constitutionally protected rights."

So, if the report of the Education Inspection and the requirements from the Ministry of Education, Culture and Sport were provided anonymously (with the exception, where appropriate, of the identification of the people who sign them in attention to the functions they have

attributed by reason of their position), as claimed by the applicant, there would be no limitation, from the data protection aspect, to be able to grant the requested access.

However, it must be borne in mind that in order for the anonymization (the dissociation referred to by the applicant) to be considered sufficient for the purposes of data protection legislation, it is necessary to ensure that the information provided is not related to a identified or identifiable natural person.

To determine if a natural person is identifiable "must be taken into account all the means, such as singularization, that can reasonably be used by the person responsible for the treatment or any other person to directly or indirectly identify the natural person. To determine whether there is a reasonable probability that means will be used to identify a natural person, all objective factors must be taken into account, such as the costs and time required for identification, taking into account both the technology available at the time of the treatment as technological advances" (consideration 26 RGPD).

Therefore, in the event that there was a real risk of re-identifying the affected persons without disproportionate efforts, access to the requested public information would have to be denied.

In any case, to be able to adequately assess the risk of re-identification (mainly, in the case of the report of the Education Inspectorate, since it is known that the identity of the investigated subjects was published by a means of communication), and also for the case that the affected persons can consent to access to the information without dissociation, if they so wish, it would be necessary to carry out the hearing procedure for the affected persons provided for in article 31 of the LTC.

## **conclusion**

The right to data protection does not prevent the applicant from being informed about which educational centers are referred to by the Ministry of Education, Culture and Sport in their requests made to the Department (...) from 1/9/2017 to 1/5/2018, as data protection legislation does not apply.

Access to the report of the Education Inspectorate and to the requirements in question in an anonymized way, as requested by the person requesting, would only be possible if he guarantees that the persons concerned cannot be identified directly or indirectly without efforts out of proportion

Barcelona, April 25, 2018