

Ref.: IAI 40/2018

Claim: 270/2018

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 information referring to foreign students in Catalonia classified by center and school stage in the 2016/2017 academic year

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 270/2018 submitted in relation to the denial of access to information referring to foreign students in Catalonia classified by center and school stage in the 2016/2017 academic year.

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 June 7, 2018, a citizen submitted a request for access to public information in accordance with Law 19/2014, of December 29, on transparency, access to public information and good governance, in which he asks:

“1- La relació de la xifra d'alumnes amb pares migrants i/o que no tenen el català ni el castellà com a llengua materna (classificats pel departament com a “estrangers nascuts a Catalunya”) en les etapes d'infantil, primària and secondary schools throughout Catalonia, grouped by center and city in which each center is located (district in the case of the city of Barcelona), in the 2016-2017 school year.

2- The list of all the educational centers of the children's, primary and secondary stages of Catalonia in the 2016-2017 school year, which in any case includes: a) The city in which each center is located (district in the case of the city of Barcelona) b) The total number of students in each center c) The cataloging of each center according to its social complexity according to the latest classification made by the Department of Education d) If the center is public or private concerted”.

2. On June 29, 2018, the Secretary General of the Department of Education issues a resolution partially approving the request for access to the information presented and agreeing to "declare the right of access to the following information:

1) Estimar l'apartat 1) de la sol·licitud, alumnes amb pares migrants que no parlin català ni castellà, que tanmateix és una informació que no posseeix el Departament d'Ensenyament, atès que únicament recull i sistematitza les dades personals dels alumnes for enrollment purposes. This data includes nationality and place of birth, but not the year of arrival in Catalonia or the language of the parents.

2) Estimate sections 2.a), 2.b) and 2.d) of the request, and inform the interested party that the information referring to the centers is already active advertising from the Department of Education, available from website of the School Map of Catalonia - consultation of centers, and the one referring to students by center for the 2016-2017 school year will be published soon during the third quarter of 2018 on the website of Open Data of Catalonia, Education section .

3) Dismiss section 2.c), cataloging of centers according to social complexity, based on art. 184.1.c), of Law 12/2009, of July 10, on education (LEC), which configures this information and other elements that make up the general evaluation of the educational system, as the object of a reserved use.

3. On June 29, 2018, the same citizen, in order to specify the terms of his request, submits a new request for access to public information addressed to the Department of Education of the Generalitat of Catalonia, in which asks:

"1- List of foreign students in Catalonia, grouped by center and stage they completed in each center, in the 2016/2017 academic year.

2- The percentage of foreign students on the total number of students in each and every school in Catalonia, in the 2016/2017 school year".

4. On July 19, 2018, the General Secretary of the Department of Education issues a resolution partially approving the request for access to the information presented and agreeing to "facilitate the requested information at the territorial level of the municipality, information that is already actively advertised by the Department of Education and that can be found in the Statistics section of the 2016-2017 academic year, General education, where a .csv file is uploaded at each educational stage that includes the nationality of the students, among others."

5. On July 23, 2018, the person requesting access to the information submitted to the GAIP a claim against the Department of Education, in which he requests that the right to access be recognized the public information requested.

6. On August 1, 2018, the GAIP transfers the claim submitted to the Department of Education and requests the corresponding report as well as the completed file.

7. On September 18, 2018, the Department of Education issues a position report on the claim presented.

8. On September 20, 2018, the GAIP requests this Authority to issue a report 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 under the terms of Regulation (EU) 2016/679 of the European Parliament and of the Council, of April 27, 2016, regarding the protection of natural persons with regard to the processing of personal data (hereafter, RGPD). Therefore, any other limit or aspect that does not affect the personal data contained in the 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, relative to the requested, investigation or the sanction of criminal, access being denied administrative or disciplinary purposes, stating applications which could lead to the claimant's right of

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

Law 19/2014, of 29 December 2014, on transparency, access to information and good governance (LTC), aims to regulate and guarantee the transparency of public activity.

Article 18 of the 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). The aforementioned article 2.b) defines "public information" as "the information prepared by the Administration and that which it has in its power as

as a result of his activity or the exercise of his functions, including that supplied by the other obliged subjects in accordance with the provisions of this law".

Law 19/2013, of December 9, on transparency, access to public information and good governance (LT) 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 and s. 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, access must be denied if the information to be obtained contains particularly protected data, unless there is express consent from the interested parties (art. 23 LTC).

In the event that the information to which you want to access does not contain specially protected data, to determine the extent of the limit it is necessary to balance the right to data protection of the affected persons, and the public interest in disclosure of the information (art. 24 LTC).

III

In the application for access presented to the Department of Education, access is requested to the number of students classified as "foreigners born in Catalonia" grouped by center and stage throughout Catalonia, and to the percentage of foreign students out of the total of the total students in each of the centers in Catalonia.

In order to determine whether this request for information is subject to the limits regulated in articles 23 and 24 of the LTC it is necessary to analyze whether the information requested contains personal data and whether the regime is therefore applicable provided for in the RGPD.

The RGPD applies to the fully automated processing of personal data, as well as to the non-automated processing of personal data contained in a file or intended to be registered in it (Article 2.1).

For the purposes of the RGPD, all information about an identified or identifiable natural person (the interested party) is considered "personal data"; in accordance with the second section of article 4.1 of the RGPD "an identifiable natural person shall be considered any person whose identity can be determined, directly or indirectly, in particular by means of an identifier, such as a name, an identification number, location data, an online identifier or one or more elements of the physical, physiological, genetic, psychological, economic, cultural or social identity of this person" (article 4.1 RGPD).

In this sense recital 26 of the RGPD states that: "The principles of data protection apply to all information relating to an identified or identifiable natural person (...)

To determine whether a person is identifiable, it is necessary to take into account all the means that the controller or any other person can reasonably use to directly or indirectly identify the natural person, such as singulation. In determining whether there is a reasonable likelihood that means will be used to identify a natural person, all objective factors must be considered, such as the costs and time required to

identification, taking into account both the technology available at the time of treatment and technological advances.”

Article 4.5 of the RGPD defines pseudonymization as "the processing of personal data in such a way that they can no longer be attributed to an interested party without using additional information, provided that this information is recorded separately and is subject to technical and organizational measures aimed at guaranteeing that the personal data are not attributed to an identified or identifiable natural person". In such a way that recital 26 of the RGPD makes it clear that "pseudonymized personal data, which could be attributed to a natural person using additional information, must be considered information about an identifiable natural person".

Therefore, personal data is any information relating to a natural, living, identified or identifiable person. The various information collected that can lead to the identification of a certain person also constitute personal data. Thus, a natural person is not considered identifiable if the identification requires disproportionate time frames or activities taking into account the costs, the time required for the identification and the available technology.

On the contrary, Recital 26 of the RGPD states that "(...)the principles of data protection do not apply to anonymous information, that is to say to information that is not related to an identified natural person or identifiable, nor to the data converted to anonymity in such a way that the interested party is not identifiable or ceases to be so. Consequently, this Regulation does not affect the treatment of this anonymous information, even for statistical or research purposes."

It must be taken into consideration that for the data to be considered truly anonymous, the anonymization must be irreversible. Personal data that has been anonymised, encrypted or presented under a pseudonym, but that can allow a person to be re-identified, remains personal data and is included in the scope of the GDPR. The decision on whether the data allows the identification of a person and on whether the information can be considered anonymous or not, depends on the specific circumstances of each case and is included in the risk analysis that the data controller must be carried out prior to the processing of the data.

In this sense, the conclusions of the Working Group of article 29 in the Opinion 4/2007 "on the concept of personal data", which analyzes the definition of personal data provided for in article 2 a) of Directive 95/46/EC, and which determines:

"For the purposes of the Directive, "anonymous data" can be defined as any information relating to a natural person that does not allow identification by the person responsible for the treatment of the data or by any other person, taking into account the set of means that can reasonably be used by the person responsible for the treatment or by any other person, to identify said person. "Anonymized data" will therefore be anonymous data that previously referred to an identifiable person, whose identification is no longer possible. Recital 26 also refers to this concept when it says that "the principles of protection will not apply to those data made anonymous in such a way that it is no longer possible to identify the interested party". Once again, the decision on whether the data allows the identification of a person and on whether the

information can be considered anonymous or not depends on the specific circumstances of each case, so a case-by-case analysis must be carried out, in which special attention must be paid to the extent to which it can reasonably be considered possible that the means to identify to said person, as described in recital 26. This is particularly important in the case of statistical information, since although it may be provided in the form of aggregated data, the original sample may not be sufficiently large and others data can allow the identification of physical persons.

It is also necessary to take into consideration Opinion 05/2014 on anonymization techniques, of the Article 29 Working Group, which formulates recommendations for the management of anonymization techniques taking into account the residual risk of identification inherent in the same. In this opinion it is made clear that the concept of identification does not only involve the possibility of recovering the name or address of a person, but also includes "potential identifiability through singularity, linkage or inference", that is to say, it is not only about the possibility of direct identification of the person, but also indirect.

In the case we are dealing with the information requested by the claimant, consisting of the total number and the percentage number of students of foreign origin classified by center and level throughout Catalonia, it is information that does not, in principle, contain data of a personal nature.

However, the Department of Education, as responsible for the treatment, in the process of anonymizing the data must assess the risks and the possibility of subsequent re-identification of the data holders taking into account the concerted circumstances of each case and, must guarantee the confidentiality of the personal information it has anonymized.

It must be taken into account that, in the case at hand, the owners of the data that have been anonymized are minors, and that as such, by application of the legal principle of the best interests of the minor, they deserve a special protection.

The Department of Education, in the motivation of its resolution, argues that "facilitating the nationality of the students, considered as a whole, does not affect the protection of the personal data of the students or their rights as minors specially protected by Law 19/2014, but in cases where it happens that there is only one student of foreign nationality in a single school, as can usually happen in small towns, providing this information by school could lead to making the minor identifiable on the basis of to the description of their nationality, ethnic or racial origin (...) for which reason and based on compliance with the protection of the minor, the Department of Education will provide the student's data at a territorial level that does not make them identifiable the persons subject to protection".

Article 25 of the LTC provides that in cases where any of the limits on access to public information provided for in that rule are applicable, the denial must only affect the corresponding part of the documentation that is affected for that limit while access to the rest of the unaffected data must be authorized. Therefore, even in the event that it is considered, as the Department argues, that in certain cases it is necessary to deny the information to guarantee the data protection of the interested parties, nothing would prevent providing the information in the terms requested, in the rest of cases in which this circumstance does not occur.

Despite this, in the case at hand it does not seem necessary to have to limit access to part of the requested information. The regulations for the protection of personal data would not prevent access by the claimant to the requested information to the extent that no personal data or information that indirectly allows the identification of the data holders is provided.

Knowing the number of foreign students in a center does not allow these students to be identified unless there is previous information about these students. In this case, however, the possibility of knowing information about the status of foreigners of the students would not derive from the information provided as a result of this request for access but through other different channels.

In those cases, such as the one raised by the Department of Education (a single student for the nursery, primary and secondary stages in a centre), in which by providing the requested information it could be possible to identify the students who have the condition "foreigner", the conclusions of this report would not change since, from the point of view of the protection of personal data of the affected students, disclosing this data would only make the affected person identifiable when this identification was previously known by other means. It would be a different matter if other additional information was provided to the "foreigner" condition, for example the number of students with special educational needs due to unfavorable family situations, number of students receiving individual dining allowances, etc. from which personal information of these students would be revealed which, in principle, would not be previously known by third parties and which would allow the identification and elaboration of profiles of them.

It does not escape our notice, however, that providing information on the number of foreign students by level and by center throughout Catalonia involves providing information that can lead to drawing up a profile of these centers based on the nationality of their students and which, as a consequence, could have a stigmatizing effect on centers that concentrate a greater number of "foreign" students, but, in any case, this issue would escape the scope of the protection of personal data.

conclusion

The regulations for the protection of personal data do not prevent the claimant from accessing information on the number of students classified as "foreigners born in Catalonia", classified by center and level, throughout Catalonia.

Barcelona, 9 October 2018