

IAI 41/2018

Claim: 309/2018

Report issued at the request of the Commission for the Guarantee of the Right of Access to Information Public in relation to the claim presented against a Department for the denial of access to the acts raised by the police during the rallies held in front of the Picasso Museum in April and May 2018

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 309/2018 presented against a Department for the denial of access to the actions taken by the police during the rallies held in front of the Picasso Museum in April and May 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 July 6, 2018, a citizen, member of a trade union, submitted a letter to a Department requesting:

"Copy of the acts carried out by the Urban Guard and/or the Cos de Mossos d'Esquadra in relation to each of the demonstrations/concentrations communicated and carried out on April 3, April 12, April 19, April 26, May 3, May 10, May 17, May 23, May 24 and May 25, at Carrer Montcada no. 19-23 of Barcelona."

2. On July 25, 2018, the general secretary of the Department issued a resolution by which he agreed to deny access to the public information requested under articles 21 and 23 of Law 19/2014, of 29 of December, of transparency, access to public information and good governance.

Specifically, he adds (FJ 3) that:

"The request presented affects data that are within these specially protected categories, since they incorporate data relating to the participants or people who can be considered organizers of the concentrations, who can act both in an individual capacity or as representatives of a collectivity or of a legal entity, whereby if the right of access were to be exercised in the requested terms, it could lead to access to specially protected data of third parties.

In this regard, it should be noted that the requested acts contain personal data, represented by first and last names and/or ID, which if cross-referenced with the information relating to the motivation of the call may allow inferring data from the organizers or

participants relating to their ideology, religion or beliefs, sexual orientation, among others.

In addition, these types of acts such as those requested have the particularity that they can denounce certain facts to be considered as constituting an administrative infraction of Organic Law 4/2015, of March 30, on the protection of public safety, and precisely because of the facts reported in them, an administrative sanctioning procedure can be initiated against the authors of these facts. Therefore, access to the information must be denied given that it may affect the rights or interests of third parties."

3. On August 29, 2018, the citizen, acting on behalf of the union, filed a claim with the GAIP against the Department for denying him access to the requested public information.

In the letter that accompanies the claim, he states that he is the person responsible or organizer of the gatherings that took place at the doors of the Picasso Museum, in respect of which the requested police actions were taken, for which which maintains that there would be no personal data of third parties. Despite everything, he requests that the records be provided to him after anonymization of these data.

4. On September 20, 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.

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 Law 19/2014, of December 29, on transparency, access to public information and good governance (hereinafter, LTC), relating to the investigation or

sanction of criminal, administrative or disciplinary infractions, the application of which could lead to the claimant's right of access being denied or restricted for the purposes of protecting the investigation.

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

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), is applicable from May 25, 2018 (article 99), and is therefore the current rule applicable in this case, given the date of submission of the access request (July 6, 2018).

In accordance with Article 2.1 of the RGPD, this Regulation applies to the fully 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 4.1 of the RGPD defines the concept of personal data as "all information about an identified or identifiable natural person ("the interested party")" and considers as an identifiable natural person "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 the physical, physiological, genetic, psychological, economic, cultural or social identity of said person."

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).

Article 6 of the RGPD establishes that it is necessary to have a legal basis that legitimizes the treatment, whether it is the consent of the affected person, whether it is one of the other circumstances provided for, such as that "the treatment is necessary for the fulfillment of a legal obligation applicable to the person responsible for the treatment (6.1.c)), or that "the treatment is necessary for the fulfillment of a mission carried out in the public interest or in the exercise of public powers conferred on the person responsible for the treatment" (6.1. e)), which is provided for in a legal basis in accordance with the provisions of sections 2 and 3 of the same article.

Article 86 of the RGPD provides that "the personal data of official documents in the possession of any 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."

III

Article 18 of the LTC recognizes the right of people 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 entity" (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".

The claim is lodged against the denial of access to the acts raised by the police forces during the rallies carried out, on the occasion of various labor claims, in front of the Picasso Museum throughout the months of April and May 2018.

According to the report drawn up by the Department on the claim, these acts would form part of an investigation prior to the start of a sanctioning procedure for a possible breach of Organic Law 4/2015, of March 30, on protection of public security (henceforth, LOPSC).

The information that forms part of information prior to the start of a sanctioning procedure is "public information" for the purposes of the LTC and remains subject to the access regime provided for in this regulation, which establishes, as a general criterion , that the right of access to public information can only be denied or restricted for the reasons expressly established by law (article 20 et seq.).

In the letter accompanying the claim, the claimant maintains that the requested information should only include his personal data, given that he was the organizer of the gatherings in respect of which the controversial acts were raised, and that, in any case, "any personal data of third parties that may be included in the minutes or attestations can perfectly be removed from the copies sent to me (...)".

From these statements, it could be inferred that the person making the claim focuses their request for access exclusively on the personal information that is recorded about them in these acts.

Article 24.3 of the LTC states that "requests for access to public information that refer only to the applicant's personal data must be resolved in accordance with the regulation of the right of access that establishes the legislation for the protection of personal data".

In this sense, article 15 of the RGPD establishes the following:

"1. The interested party will have the right to obtain from the person in charge of the treatment confirmation of whether or not personal data that concern them are being processed and, in such case, the right to access the personal data and the following information: a) the purposes of the treatment; b) the categories of personal data in question; c) the recipients or the categories of recipients to whom the personal data was communicated or will be communicated, in particular recipients in third parties or international organizations; d) if possible, the expected period of personal data conservation or, if not possible, the criteria used to determine this period; e) the existence of the right to request from the person in charge the rectification or suppression of personal data or the limitation of the treatment of personal data relating to the interested party, or to oppose said treatment; f) the right to present a claim before a control authority; g) when the personal data has not been obtained from the interested party, any available information about its origin; h) the existence of automated decisions, including profiling, referred to in article 22, sections 1 and 4, and, at least in such cases, significant information about the logic applied, as well as the importance and expected consequences of said treatment for the interested party. 2. (...)

3. The person responsible for the treatment will provide a copy of the personal data subject to treatment. The person in charge may charge a reasonable fee based on administrative costs for any other copy requested by the interested party. When the interested party presents the request by electronic means, and unless he requests that it be provided in another way, the information will be provided in a commonly used electronic format.

4. The right to obtain a copy mentioned in section 3 will not negatively affect the rights and freedoms of others."

However, article 23 of the RGPD provides that:

"1. The Law of the Union or of the Member States that applies to the person responsible or the person in charge of the treatment may limit, through legislative measures, the scope of the obligations and the rights established in articles 12 to 22 and article 34, as well as in article 5 to the extent that its provisions correspond to the rights and obligations contemplated in articles 12 to 22, when such limitation essentially respects fundamental rights and freedoms and is a necessary and proportionate measure in a society democratic to safeguard: a) the security of the State; b) the defense; c) public security; d) the prevention, investigation, detection or prosecution of criminal offenses or the execution of criminal sanctions, including the protection against threats to public security and their prevention; e) other important objectives of general public interest of the Union or of a Member State, in particular an important economic or financial interest of the Union or of

a Member State, including in the fiscal, budgetary and monetary areas, public health and social security; f) the protection of judicial independence and judicial procedures; g) the prevention, investigation, detection and prosecution of violations of deontological norms in the regulated professions; h) a function of supervision, inspection or regulation linked, even occasionally, with the exercise of public authority in the cases contemplated in letters a) ae) and g); i) the protection of the interested party or the rights and freedoms of others; j) the execution of civil demands. (...)"

In the present case, as we have seen, one of the reasons for the denial of access cited by the Department is that the information requested (the police records) is part of a previous investigation initiated to assess whether a sanctioning file as a result of the facts collected in these acts.

The LOPSC expressly foresees the possibility that the competent body, before agreeing to start a sanctioning procedure, can carry out preliminary actions with the aim of knowing the circumstances of the specific case and the convenience or not of start the procedure (article 48).

These investigative actions are fundamentally aimed at determining, with the greatest possible precision, the facts likely to motivate the initiation of the sanctioning procedure, the identification of the person or persons who may be responsible and the relevant concurrent circumstances.

It is a consolidated jurisprudential criterion that the investigation phase prior to the start of a sanctioning or disciplinary procedure does not properly constitute an administrative procedure (among others, STSJM 471/2006, of May 24), as well as that its reserved nature (its knowledge can lead to clear damage to the result of the same) prevents access to its content during its processing (among others, STS 21/2018, of February 15). And this affects, even, the person who is being investigated (among others, STSJC 1212/2005, of November 25), as would be the case of the person claiming, as an organizer of the concentrations (article 30.3 LOPSC).

Along these lines, the LTC expressly establishes the possibility of limiting or denying access to public information if its knowledge or disclosure entails a detriment to the investigation or sanction of the criminal, administrative or disciplinary offense in question (article 21.1.b)).

Therefore, despite the fact that article 15 of the RGPD recognizes the right of the person claiming to access their personal information, while the aforementioned preliminary investigation is being processed, its reserved nature should certainly prevail and the person claiming would not have right to access its content.

At the moment, however, that this phase of investigation concludes, its reserved or confidential nature may lapse (STSJM 471/2006, of May 24).

From this moment on - it cannot be ruled out that, on the date of issue of this report, the previous information has concluded - and there is no rule with the rank of law that limits access under the terms of article 23 of the RGPD, the person making the claim has the right to access all the information about them that appears in the information provided or generated in the course of the previous information, such as in the requested police acts.

Having said that, it cannot be overlooked that these acts could also contain information from third parties. This is what the Department maintains as a reason for denying him access, in the second term.

Once the preliminary investigation phase is concluded, otherwise, as has been said, the reserved nature of these actions should prevail, the regime applicable to access to the personal data of third parties will depend on its result, that is of whether the archive of the investigative actions carried out or the start of the sanctioning procedure is agreed. This forces us to examine both scenarios.

v

In the event that the previous information has concluded with the filing of the actions, access to third party data that may be included in the police records will be governed by the criteria established in articles 23 and 24 of the LTC.

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."

According to the Department, the police reports contain the identification data of other people other than the one now claiming that they could also be considered organizers of the gatherings. In particular, it indicates that the name, surname and/or ID would be included.

From the perspective of data protection, despite the fact that the previous actions end with their archive and no sanctioning procedure is initiated, the information about the persons reported or investigated is considered information related to the commission of administrative infractions. It should be borne in mind that the mere fact of providing information about a person who has been investigated for facts that could constitute an administrative offense (in this case, for an offense of the LOPSC) could cause serious damage to privacy of the affected person, in particular, in attention to the nature and seriousness of the facts investigated. This means that, despite the doubt that may arise regarding its inclusion in the access regime of article 23 of the LTC - because the sanctioning procedure has not been initiated -, a reasoned weighting between the different rights and interests at stake that would need to be done in accordance with article 24.2 of the LTC, would also oblige us to take into account this circumstance that could lead to a denial of access to this information.

On the other hand, it cannot be ruled out that there is other information deserving of special protection, such as data relating to your union membership (Article 9.1 RGPD), taking into account that the facts investigated are related to concentrations or demonstrations

which, on the occasion of certain labor claims, were called by a certain union.

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 known that this consent was obtained in the present case.

Therefore, access to the police records, as long as they contain the aforementioned personal information, should be denied on the basis of what is provided for in article 23 of the LTC.

Having said that, it should be borne in mind that the person making the claim expressly indicates in their claim that access to the records occurs by removing the personal data of third parties that may be included.

Facilitating access to public information prior to anonymisation of the personal data contained therein (the removal of data referred to by the claimant) is, in fact, an option expressly provided for in the transparency regulations.

Thus, article 15 of Law 19/2013, of December 9, on transparency, access to public information and good governance, 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."

However, in order for anonymization to be considered sufficient for the purposes of data protection legislation, it is necessary to ensure that the information provided does not relate to an 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, if the police acts were facilitated in an anonymized way, as requested by the person making the claim, without it being possible to identify the other people investigated without disproportionate efforts, there would be no limitation, from the data protection side, for be able to grant the requested access.

Point out, at this point, that, apart from the information relating to the people investigated, the acts will also contain information about the people who carried them out, that is the police officers.

Article 24.1 of the LTC provides that:

"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."

Although this precept would enable the disclosure of the identity of the people involved in the preliminary investigation in attention to the functions attributed to them by reason of their position, in the present case, being police officers, their identification should occur, for security reasons, through your professional identification number.

VI

In the event that the previous information has concluded with the initiation of a sanctioning procedure against the person making the claim, and bearing in mind that, in accordance with article 48.1 of the LOPSC, these actions must be incorporated into the same, your request for access will be governed by the provisions of Law 39/2015, of October 1, on the common administrative procedure of public administrations (hereinafter, LPACAP), when the claimant holds the condition of interested person (article 4).

The first additional provision of the LTC establishes that "the access of the interested parties to the documents of the administrative procedures in progress is governed by what is determined by the legislation on legal regime and administrative procedure."

Article 53.a) of the LPACAP states 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 a 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."

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 exceptions 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".

In the present case, as we have seen, the information requested by the claimant (the police records) could contain data relating to the trade union affiliation of other investigated persons, given that the concentrations that motivated the police actions were called by a specific union.

Article 9.1 of the RGPD establishes:

"1. The processing of personal data that reveal 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 would also contain, as we have seen, data relating to infringements and administrative sanctions, regarding which, it cannot be overlooked, the Spanish legislator has been establishing a reinforced system of protection. Proof of this is the LTC itself (Article 23).

On the other hand, the RGPD requires that any data processing that is carried out (such as data communication or access) is limited to the minimum data necessary to achieve the intended purpose of this processing (Article 5.1.c) , related to the data minimization principle).

Considering that the primary purpose of the right recognized in the aforementioned article 53.a) of the LPACAP (and in similar terms to article 26 of Law 26/2010) is to guarantee the right of defense (article 24 EC) of the person interested in the procedure, in order to admit the claimant's access to the sensitive or deserving of special protection information of third parties that may be contained in the police records, it would be necessary for this information to be relevant to the exercise of his right of defence. And, at this point, it must be borne in mind that the person making the claim expressly demands that any data on third parties that may appear in the disputed acts be deleted.

Given the terms in which the claim is made, to the extent that the police acts are facilitated prior to the anonymization of the data relating to the other persons investigated, in such a way that they cannot be identified without disproportionate efforts, there would be no inconvenience, since the perspective of data protection, for this documentation to be delivered to the person making the claim.

In relation to the identification data of the agents who sign the acts, this anonymization would not be necessary, given that the knowledge of this data by the person claiming would find protection in the LPACAP, which recognizes citizens' right to identify the authorities and personnel in the service of public administrations (article 53), as in Organic Law 2/1986, of March 13, on the security forces and bodies and their

deployment regulations, which establish the obligation of police forces to identify themselves to citizens, which should be carried out through the number corresponding to their professional identification cards.

conclusion

The person claiming does not have the right to access their information contained in an investigation prior to the initiation of a sanctioning procedure for an infringement of the LOPSC while this action is being processed.

Once concluded, and given the terms in which the present claim is made (previous anonymization), there would be no inconvenience, from the point of view of data protection, for them to access the requested police acts, in to the extent that it only contains information referring to your person and it is guaranteed, with respect to the other people investigated, that they cannot be identified directly or indirectly without disproportionate efforts.

Barcelona, November 9, 2018

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