

Ref.: IAI 45/2018

**Claim: 321/2018**

**Legal report issued at the request of the Commission for the Guarantee of the Right of Access to the Public Information in relation to access by a trade union section to information on overtime hours worked in 2017 by the workers of a town hall**

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 321/2018 presented by a trade union section against a City Council for the lack in response to the request for access to overtime hours made in 2017 by City Council workers.

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 this Legal Advice I issue the following report.

**Background**

1. On July 25, the representative of the trade union section of a City Council, presents to the City Council a request for access to the list of overtime hours worked by each worker during the year 2017.
2. On August 31, 2018, GAIP received the claim made by the Trade Union Section of the City Council, which reiterates the request made due to the lack of response from the City Council.
3. On September 5, 2018, the GAIP requests the claimant to specify the reasons that lead her to present the claim. On September 7, the claimant responded to the request made by the GAIP.
4. On September 7, 2018, the City Council provides the Trade Union Section with a copy of the delegated councilor's decree of August 31, 2018, in which access is denied.
5. On September 17, 2018, the GAIP requested a report from the City Council in relation to this claim.
6. On September 26, 2018, the GAIP requests this Authority to issue the report in relation to the claim presented.

**Legal Foundations**

I

In accordance with article 1 of Law 32/2010, of October 1, of the Authority Catalan Data Protection Authority, the APDCAT is the independent body responsible for

purpose of guaranteeing, within the scope of the powers 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 request a report from 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 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 (hereafter, LTC).

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), defines personal data as "any information relating to 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; "

The data available to the City Council, which identify and refer directly to workers, as well as other data that may refer more specifically to the workplace they occupy, but which are associated or linked to a specific worker, and which therefore identify you, are personal data and are protected by the principles and guarantees established by the RGPD.

The RGPD provides that all processing of personal data must be lawful (Article 5.1.a)) and, in this sense, establishes a system of legitimizing data processing based on the need for one of the legal bases to be met established in its article 6.1. Specifically, section e) states that the treatment will be lawful if "it 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".

Article 6.3 of the RGD establishes that the basis of the treatment indicated in Article 6.1 e) must be established by the Law of the European Union or by the law of the Member States that applies to the person responsible for the treatment. The referral to the legitimate basis established in accordance with the internal law of the member states referred to in this article requires, in the case of the Spanish State, that the development norm, as it is a fundamental right, has rank of law (Article 53 CE).

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

Specifically, article 18 of the LTC establishes that "people have the right to access public information, referred to in article 2.b, individually or in the name and representation of any legal entity legally constituted" (section 1).

The mentioned article 2.b) 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 the which are supplied by the other obliged subjects in accordance with the provisions of this law". Therefore, the information requested is "public information" subject to the access regime provided for in the transparency legislation.

The claim is lodged against the lack of response to the request for access to the list of overtime hours worked by City Council workers during 2017, although the City Council subsequently responded rejecting the access

This information is public information for the purposes of article 2.b) LTC and, therefore, remains subject to the access regime provided for in the transparency legislation.

In this context, it is necessary to analyze whether, through the exercise of the right of access to public information recognized in the transparency legislation, there would be legal authorization for the claimant to access said information.

### III

The public information that is intended to be accessed contains personal data. In this sense, it is necessary to take into account the limits provided for in articles 21, 23 and 24 of the LTC. Remuneration information of workers is not considered particularly protected (article 23 LTC). Therefore, article 24.2 LTC will have to be applied, according to which:

"2. If it is other information that contains personal data not included in article 23, access to the information can be given, with prior weighting of the public interest in disclosure and the rights of the affected persons. To carry out this weighting, the following circumstances must be taken into account, among others: a) The elapsed time. b) The purpose of the access, especially if it has a historical, statistical or scientific purpose, and the guarantees offered. c) The fact that it is data relating to minors. d) The fact that it may affect the safety of people. (...)."

Thus, access to the requested personal information goes through a prior, reasoned weighting between the public interest in disclosure and the rights of the people affected.

Before that, however, it should be noted that the person who submits the request for access to the City Council does so in the name and representation of a Trade Union Section. As stated in the City Council's decree of August 31, 2018, through the GAIP, this person is part of the Staff Board representing the union and the staff. This question is relevant, given that they are the boards or staff delegates (art. 39 of the Royal Legislative Decree 5/2015, of October 30, which approves the revised text of the Basic Statute Law of the 'public employee, hereinafter TRLEBEP), as well as the Company Committee (art. 63 of the Workers' Statute, hereinafter ET), the specific bodies representing civil servants and public workers with employment contracts respectively, and as to such, they exercise the functions granted to them by the corresponding regulations (art. 40 TRLEBEP and 64 ET), among others, the function of monitoring compliance with the regulations in force.

Given this consideration, as can be seen from the terms in which the access is formulated, what is requested is remuneration information, specifically overtime hours, associated with each specific worker and limited to a specific time period (year 2017). The information on overtime hours worked by a worker is part of the complementary remunerations that are essentially linked not to the workplace but to the natural person who occupies it, and must correspond to the amounts set by each administration with the limitations corresponding regulations. It should be noted that the specific amount received by each worker for this concept is not part of the RLT.

Having said that, it is worth remembering the provisions regarding active advertising established for remuneration in article 11.1 of the LTC. According to this precept, the remuneration received by senior local officials must be published on the portal individually for each job and for any type of remuneration, compensation or allowance. Regarding this, article 4.2.b) of Law 19/2014 provides that, for the purposes of what is established in the law, they are considered high-ranking officials, in the service of the local administration, "the local representatives and the holders of superior and managerial bodies, in accordance with what is established by local regime legislation". This same criterion can be extended with respect to personnel who occupy positions of trust, of special responsibility within the organization, of free appointment, or that involve a high level of remuneration.

Thus, although in these cases the law does not provide for the publication of their remuneration on the Transparency Portal, with regard to requests for access to this information, it must be borne in mind that these are sites that their uniqueness and also due to the level of remuneration they are usually associated with, knowledge of their remuneration can be relevant for the control of the use of public resources. In these cases, it would be justified to provide individualized remuneration information, even identifying the people affected, and which could include overtime hours worked.

As for the rest of the workers, the information on remuneration must be published in an aggregated manner, that is to say, associated with the public administration jobs in question, grouped according to the levels and the bodies to which they belong, without, in this sense, having to indicate the identity of the specific person who occupies a certain job.

In this sense, to the extent that this information must be made public, no doubt can arise from the perspective of the right to data protection of the affected persons, the right of access of the now claimant. However, information on overtime worked is not among this information that must be published.

#### IV

At this point, it is necessary to assess what is the purpose of accessing the list of overtime hours of each worker, corresponding to the year 2017. According to the claimant, the reason responds "to the fact that we need to control that in no case the legal limit of 80 overtime hours per year per worker is exceeded".

Article 40.1.a) of the EBEP, provides that the Personnel Boards and the Personnel Delegates must receive information on the personnel policy, as well as on the data relating to the evolution of remuneration, probable evolution of employment in the corresponding field, and on performance improvement programs. With regard to article 64 of the ET, the Works Council has the right to be informed about the issues that may affect the workers, and about the situation of the company and the evolution of employment this one, among others.

The Agreement governing the working conditions of City Council officials applicable to civil servants (article 48), and the Collective Labor Agreement of City Council employees (article 18), provide that the representatives of the workers will know the details and the number of extraordinary gratuities that have been made.

In this case, in order to carry out these monitoring functions, it might be necessary to have an individualized list of overtime hours worked by the workers. This would allow the workers' representative body to check the correct allocation of hours. However, this purpose can also be achieved without sacrificing the privacy of the affected workers.

It should be remembered that according to article 5.1 b) of the RGPD "the data will be adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed ("data minimization").

It must be taken into account that the disclosure of information on the income of a natural person facilitates the obtaining of an economic profile of the affected person which may end up causing him harm both in the professional field and in front of 'financial institutions, social etc. Although in this case the remuneration information would only refer to one of the salary supplements (overtime), the truth is that the claimant can obtain information on the basic salary and remuneration supplements of the jobs held by public employees, via publication of the RLT and the corresponding Budget Law or have the basic copy of the contract and therefore know the salary and other agreed remuneration supplements.

It must be remembered that in a case like the one we are dealing with, the aim is not to control the workers, but to control the municipal action.

Therefore, in this case, the purpose of transparency can also be achieved by applying what is known in terms of the RGPD as pseudonymization: "the treatment of personal data in such a way that they can no longer be attributed to an interested party without using information additional, provided that said additional information appears separately and is subject to technical and organizational measures aimed at ensuring that personal data are not attributed to an identified or identifiable natural person;" (article 4.5 RGPD).

To this end, the list with the overtime worked by each worker could be facilitated, replacing their first and last name with a numerical code assigned to each

of them, in such a way that it allowed to see and control the distribution of these hours among the group of workers grouped by professional categories. It should be noted that it can be carried out if it is a city council job that has a sufficiently large number of workers, in such a way that identifying each worker requires disproportionate deadlines or activities.

Thus, the code should be kept in the communication made in this regard to the claimant, for the purposes of being able to see the accumulation of extra hours assigned to each of them, but it should only be used for to the monitoring of the performance of overtime, and not for any other information different to this specific treatment, since, if it were to be used in a general manner for all actions carried out in the worker's work area, it would be easy that the crossing of various data that could be obtained by the works committee, would make their identification possible and would end up having the same result as that which can have the identification of workers with their ID number.

In addition, in order for these codes to be effective from the perspective of data protection, it is necessary to ensure that the identity of the worker is known only to the person who attributes the code, so that the worker is not identifiable by any other person, among others, by the representatives of the workers who will receive this information.

Of all the above, it is considered that the option of providing a list of overtime hours together with a numerical code in place of the first and last names of the workers would be the most suitable, in order to find in this case the right balance between the right to the protection of personal data of the affected workers and the right of access to public information of the applicant.

v

Finally, it is necessary to emphasize the importance of transferring the request to the affected persons, as provided for in articles 31.1 and 42 of the LTC, either by the City Council, during the processing of the request access, either by the GAIP during the claim procedure, so that it can be known if there is a specific personal circumstance that justifies the limitation of the right of access. For these purposes, the GAIP can use the data contained in the file to contact the affected persons or request the City Council to provide them with the data that can be used to contact them in contact

## **Conclusions**

The data protection regulations would not prevent the claimant's access to the list of overtime hours worked by the elected officials, senior officials and managers of the corporation and the rest of the staff who occupy positions of trust, of free appointment, of special responsibility within the organization or that involve high levels of remuneration.

As for the rest of the workers, data protection regulations would not prevent access to the list of overtime hours worked by municipal workers during the requested time period, as long as this information is provided by replacing the first and last name of workers by a numerical code.

Barcelona, on 9 October 2018