

CNS 3/2019

Opinion on the query made by a public entity in relation to the possibility of publishing on the corporate website the information related to the adherence to the Code of Ethics and Conduct and the conflict of interest questionnaire of the senior officials and managers of your entity and other related entities.

A public entity makes a query in relation to the possibility of publishing information related to the adherence to the Code of Ethics and Conduct and the conflict of interest questionnaire of senior officials and managers of the entity and other entities in the context of transparency linked

In the consultation letter, it is stated that the entity's functions include ensuring the application of the Code of Ethics and Conduct for Senior Officials and Related Entities, which was approved by the Metropolitan Council on January 30, 2018.

It is made clear that the subjects bound by this Code are the representative offices, all the members of the Metropolitan Council, the senior officials and managers of the entity and its related entities who have a similar position, and points out that the Code is mandatory compliance, as reflected in its text.

Likewise, it is stated that during the months of June and July 2018 he addressed personalized letters to the recipients of the Code so that they would sign the adhesion document and complete the questionnaire for the prevention of conflicts of interest.

On the other hand, it is pointed out that the first point of the Code establishes that the adhesion of senior officials to the code is the subject of active advertising on the web portal and is mandatory.

Based on the antecedents presented, the entity raises the following questions:

- First of all, if it is possible to give active publicity in relation to the positions that have signed the Code, that is to say, if the name and position of the signatories can be published without the need to anonymize any aspect. In the same way, if it would be possible to publish the position and the name of the people who have not signed.**

It is emphasized that the Code applies not only to the entity's senior positions and management staff, but also to its related entities.

- Secondly, if it is possible to publish the questionnaire for the prevention and detection of conflicts of interest with the information it contains. It is pointed out that the promotion of the prevention of conflicts of interest as a tool for the prevention of criminal risks is one of the new instruments promoted by the Transparency Agency.**

It is highlighted that in the accession letter sent personally to senior officials and management staff, they were informed that the documents (accession document and questionnaire) were confidential and would be kept by the Transparency Agency.

Analyzed the consultation, which is accompanied by the Code of Ethics and Conduct and the documents of adherence to the Code and the questionnaire on conflicts of interest of the high officials and managers of the entity and related entities, and in accordance with the 'report of the Legal Advice I issue the following opinion.

I

(...)

II

The consultation raises the issue of the publication of certain personal information of senior officials and managers of the entity and its related entities related to different measures provided for in the transparency legislation in matters of good governance.

Article 5.1.a) RGPD establishes that all processing of personal data must be lawful, loyal and transparent in relation to the interested party ("lawfulness, loyalty and transparency"). In order for this treatment or disclosure of personal data to be lawful, one of the conditions provided for in article 6 RGPD must be met, and in the case of special categories of data, the provisions of the article must also be taken into account 9 GDPR.

Article 6.1 RGPD provides that in order to carry out a treatment there must be a legal basis that legitimizes this treatment, either the consent of the affected person, or any of the other circumstances provided for in the same precept, such as "the treatment is necessary for the fulfillment of a legal obligation applicable to the person responsible for the treatment" (letter c), or that "the treatment is necessary for the fulfillment of a public interest or in the exercise of public powers conferred on the person responsible for the treatment" (letter e), and this is recognized on a legal basis in accordance with the provisions of sections 2 and 3 of the same article.

Section 3 of this precept provides: "The basis of the treatment indicated in section 1, letters c) and e), must be established by:

a) the Law of the Union, or

b) the law of the Member States that applies to the person responsible for the treatment.

The purpose of the treatment must be determined in said legal basis or, in relation to the treatment referred to in section 1, letter e), it will be necessary for the fulfillment of a mission carried out in the public interest or in the exercise of conferred public powers to the person responsible for the treatment. (...)"

On the other hand, article 86 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 in accordance with the Law of the Union or of the states

members that apply them in order to reconcile the public's access to official documents with the right to the protection of personal data under this Regulation."

The referral to the legitimate basis established in accordance with the internal law of the member states requires, in the case of the Spanish State, in accordance with article 53 of the Constitution of Spain, that the development rule, as it is a fundamental right, has the status of law.

In this sense, the new Organic Law 3/2018, of December 5, on Protection of Personal Data and guarantee of digital rights (BOE No. 294 of December 6, 2018) refers to the range of the standard necessary to establish these limitations:

"Article 8. Treatment of data covered by legal obligation, public interest or exercise of public powers."

1. The processing of personal data can only be considered based on the fulfillment of a legal obligation required of the person in charge, in the terms provided for in article 6.1.c) of Regulation (EU) 2016/679, when so provided by a law of the European Union or a rule with the rank of law, which may determine the general conditions of the treatment and the types of data subject to it as well as the assignments that proceed as a consequence of the fulfillment of the legal obligation.

Said rule may also impose special conditions on treatment, such as the adoption of additional security measures or others established in Chapter IV of Regulation (EU) 2016/679.

2. The treatment of personal data can only be considered based on the fulfillment of a mission carried out in the public interest or in the exercise of public powers conferred on the person responsible, in the terms provided for in article 6.1 e) of Regulation (EU) 2016/679 , when it derives from a competence attributed by a rule with the rank of law."

Law 19/2014 regulates in Title II the regime of transparency in public activity through which it obliges all subjects including local authorities and their related entities (article 3) to adopt the necessary measures to facilitate the people the knowledge of the public information, which must be made public in the electronic offices and websites of the obliged subjects. It defines "transparency" as "the proactive action of the Administration to make known the information relating to its areas of action and its obligations, on a permanent and updated basis, in a way that is more understandable for people and through dissemination instruments that allow them broad and easy access to data and facilitate their participation in public affairs" (article 2.a) Law 19/2014.

Article 8.1 of the LTC obliges the Public Administration - concept in which, for the purposes of this Law, the bodies or entities linked to the entity are included (art.2 f) and 3.1.b) LTC) - to publish, in application of the principle of transparency, the information relating to the different subjects or actions, including, in addition to those specified in articles 9 to 15 LTC, "the subjects and actions whose publicity is established by a rule (art. 8. l) LTC), as well as "any matter of public interest, and the information that is requested more frequently through the exercise of the right of access to public information. " (art. 8. m) LTC)

These precepts would enable the Administration and other subjects obliged to publish, in addition to the information provided for by the regulations, any information that could be considered relevant to the public interest, notwithstanding that the limitations provided for in articles 20 et seq. of the LTC.

Remember that according to article 7.1 of the LTC, "the limits applicable to transparency obligations are the same as those established by Title III for the right of access to public information, especially those relating to the protection of data."

Based on these premises, it is necessary to analyze whether the information related to the senior officials and managers of the entity and related entities that is exposed in the consultation - information that is public under the terms of art. 2. b) LTC)-, can be the subject of active advertising (understood this as "the duty of the subjects obliged to make public, ex officio, the public contents determined by Chapter II of Title II" (art. 2. i) LTC, and assess in accordance with the criteria provided for in articles 23 and 24 of the LTC the limitations that may occur with respect to the right to the protection of personal data of the affected persons.

III

With regard to the possibility of publishing on the respective corporate website the first and last names and position of senior officials and managers of the entity and of related entities that have adhered to the Code of Ethics and Conduct of the entity and those who they have not done, it must be taken into account, at the outset, that neither the LTC nor any other specific rule provides for the disclosure of said information.

Despite this, the list of subjects subject to active publicity is not a closed list, and the Administration has the duty to publish any matter that is of public interest (article 8. m) LTC), notwithstanding that they are applicable the limitations provided by the same Law.

In this case, the information that is intended to be published is personal information of the senior officials and managers of the affected entities and given that it is not data considered to be particularly protected under the terms provided for in article 23 of the LTC, its disclosure through the portal requires a reasoned weighting between the public interest that the knowledge of said information may have for citizens and the right to data protection of the affected persons, in accordance with the criteria provided for in the article 24.2 of the LTC:

"2. If it is other information that contains personal data not included in article 23 (specially protected data), access to the information can be given, with the previous reasoned weighting of the public interest in the disclosure and the rights of the affected people

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. (...)"

To make a correct weighting, it is necessary to analyze what is the regulation provided for in the transparency legislation in relation to the subjection of senior officials and managers to the codes of conduct.

Article 54 of the LTC obliges the senior officials of the Administration of the Generalitat, of the local Administration and of the other public bodies and institutions included in article 3.1 of the LTC to act in accordance with the principles and rules of conduct provided for in article 55.1 of the LTC.

For these purposes and for the specific case being analyzed, the local representatives and the holders of the superior and management bodies would be considered senior positions in the service of the entity, in accordance with the local regime legislation (art. 4.2.b) LTC).

In turn, they would be considered senior positions in the service of the other public bodies referred to in article 3 LT, the holders or members of governing bodies and managerial positions (art. 4.2.c) LTC.

Article 55.3 of the LTC obliges local bodies and public bodies and institutions included in article 3.1 of the LTC, to draw up a code of conduct for their senior officials that specifies and develops the principles of action to referred to in section 1, establish additional ones, if applicable, and determine the consequences of breaching them, without prejudice to the sanctioning regime established by this law.

In compliance with the provisions of the regulations, the Metropolitan Council agreed on January 30, 2018 to approve and publish in the Official Gazette of the Province the "Code of ethics and conduct for senior officials of the entity and related entities. " This applies, according to the provisions of section 1, to the obligated subjects, senior positions and positions, general manager, area directors and directors of services) and its related entities that have a similar position.

From its approval, the senior officials and managers affected remain obliged to act in the exercise of their functions not only in accordance with the ethical principles and rules of conduct provided for in article 55.1 LTC, but also, as as provided for in section 3 of the same precept, with those principles and rules that may contain the respective codes of conduct approved by the entity to which they provide service.

Point out that the binding of senior officials in the terms provided for in article 54 of the LTC to the principles and rules provided for in the codes of conduct approved by the obliged subjects (art. 55.1 and 3.1 LTC), does not depend on the fact that s 'adhere to it or not. They are obliged to comply with them, because this is what the LTC provides, regardless of whether they have expressed their personal commitment through a declaration of adhesion. Membership may have other objectives, such as ensuring effective knowledge by senior officials and managers of the rules with which they must act in order to make them their own, but in no case can it condition the its compliance since this derives from a regulatory mandate.

The consequence of this is that the failure to comply with the principles of good conduct established by laws and codes of conduct by senior officials may constitute a serious or very serious offense in accordance with article 78. 2 g) of the LTC) and could be sanctioned with the imposition of a fine, or any of the other measures provided for in article 81 of the LTC, such as suspension or temporary disqualification from holding office or even dismissal . This

sanctioning regime would be applicable both to senior officials and managers who have adhered to the respective code and to those who have not.

As can be seen from the preamble of the Law, "A democratic society and the need for public interests to be served with objectivity, neutrality and impartiality requires that the leadership of public servants, especially high officials, conform to parameters that guarantee compliance with these principles. In this sense, the Law establishes the principles of good governance that must make this possible, which must be developed through ethical and good conduct codes. (...)"

The LTC conceives of "good governance" as "the principles, obligations and rules on the quality of services and the operation of the Administration, and the ethical principles and good practices in accordance with which they must act the senior positions of the Administration, the managerial positions and the rest of the personnel at the service of the Administration, with the aim that it functions with maximum transparency, quality and fairness, and with a guarantee of retention of LTC).

For these purposes, it may be of interest to citizens to know the ethical principles and rules of conduct that the organization has decided to impose on its senior officials and managers through the Code of Ethics and Conduct that develops those already established in the LTC, the consequences that have been foreseen in the event of non-compliance and/or, where appropriate, the internal control mechanisms that the entity provides in order to ensure their application. Thus, through the publication of codes of conduct, citizens can learn about the specific rules that are imposed on high-ranking officials and managers with responsibility for decision-making, and at the same time assess the degree of commitment of the entity itself in require their employees to comply with certain behaviors.

Beyond that, and to the extent that it is a code of conduct of mandatory compliance, it does not appear that the exposure to the public of information related to the adherence or not of these positions and managers to the respective codes of conduct, may be relevant for the purposes of achieving the objective of transparency pursued, and therefore, the disclosure of said information would be contrary to the principle of data minimization (Article 5.1 c) RGPD), and cannot be protected in the active advertising duty provided for in the LTC.

IV

With regard to the possibility of publishing on the transparency portal the document "Questionnaire for the prevention of conflict of interests of the code of ethics and conduct for senior officials of the Metropolitan Area of Barcelona and related entities", it is necessary to analyze the type of information it contains and assess what are the forecasts of active advertising in relation to this matter.

Thus, the instructions for this questionnaire state that this is a document annexed to the Code of Ethics and Conduct for senior officials of the entity and related entities, and is defined as a tool for early detection of the existence of potential conflicts of interest so that the Transparency Agency can recommend appropriate measures to prevent them.

In view of the model document attached to the query, it consists of three parts: A first part with the identifying data of the person declaring (name and surname, place

of work and organization), a second part, where the questionnaire is specified with three sections and a third part where there are final statements.

Specifically, the questionnaire refers under the title of economic interests to bonds, shares, investments and other financial assets, as indicated in the "glossary" of the same document. The declarant must answer if he or his family up to the fourth degree of consanguinity or third degree of affinity, has economic interests in any company that in the last 2 years has been a supplier of works, goods and services to the organization. If so, the name of the person holding these interests (declarant or family member), the name of the company, and the description of the type of interest must be stated.

Secondly, and under the title of professional activities (understood by the same glossary of the document as employment, consultancy, training, research, remunerated advice), the declarant must answer:

- if he/she or his/her family up to the fourth degree of consanguinity or third degree of affinity, is an administrator or member of any board of directors or board of directors of any company that in the last 2 years has been a supplier of works, goods and services to the organization for which he works. If so, it is necessary to identify the person (declarant or family member) who holds the position, the company, the position held and the kinship or link.
- If he/she or his family carries out professional activity, consulting, training, research, advice, or any other work relationship for which he receives fees with a company that in the last two years has been a supplier of works, goods and services to the organization for which he works, and if so, it is necessary to identify the person carrying out this activity, the company, the position he holds and the kinship or link.

Thirdly, under the title of ties with employees, the person declaring must answer if any member of his family is a member of the corporation or staff in the service of the entity or one of its related entities, and in if so, the person with whom the link is maintained, the kinship or link, the organization for which he works and the workplace must be identified.

Finally, the document includes some final declarations in which the person who signs declares that he is up to date with his declaration of compatibility and updated declarations of goods, deposited before the competent bodies; undertakes to inform about any change that affects the current statement and not to provide in any case, directly or indirectly, information that could favor a tenderer in recruitment processes or a candidate in personnel selection processes, nor take any action tending to influence the impartiality of these procedures.

Thus, the personal information that can be contained in this model would make it possible to draw up an economic profile of the person making the declaration, as well as to evaluate certain aspects of their behavior, such as the consistency of their public performance, in relation to their performance in private sphere, as would be the case of the activities or investments carried out. In addition, it could provide information on the economic or professional situation of people in a wide family environment (up to the fourth degree of consanguinity or third degree of affinity) of the declarant.

Section 2.7 of the entity's Code of Ethics and Conduct relating to "conflicts of interest", states that subscribing to this questionnaire responds to the need to promote a culture of integrity, the prevention of conflicts of interest and ensure the prevalence of public interest over private interests.

Article 55.1 of the LTC requires senior officials to act with "impartiality in decision-making, with a guarantee of the necessary conditions for independent action and not conditioned by conflict of interest" (d); "the exercise of the position with absolute dedication in accordance with what is established by the legislation on incompatibilities" (h); "the exercise of the position for the exclusive benefit of public interests for the exclusive benefit of public interests, without carrying out any activity that may come into conflict" (i) or "the duty to refrain from intervening in the matters under their jurisdiction when any of the cases of abstention established by the Law occur" (n).

For these purposes, senior officials are subject to the incompatibilities regime and the obligations to declare activities, assets and interests established by specific legislation (art. 56.1 of the LTC).

This subjection affects, just as with regard to codes of conduct, senior officials of the local administration as well as those of other public bodies and institutions included in article 3.1 of the LTC (art. 54.1 LTC).

For these purposes, and in accordance with article 54.2 of the LTC, local representatives and the holders of superior and managerial bodies are considered high-ranking officials in the service of the local administration, in accordance with what establishes the local regime legislation (art.4.2.b) LTC, and at the service of the other public bodies referred to in article 3, the holders or members of the governing bodies and the managerial positions of said bodies (art.4.2 .c)

The LTC obliges these people to submit a declaration of activities, assets and interests in the terms provided by the specific legislation, and therefore, once again subjection to this regime is given by legal imperative and does not depend of the individual criterion of each of those affected.

Article 56.2 LTC provides that "the Register of declarations of activities is public. Access to the registers of declarations of patrimonial assets and interests is governed by their specific regulations, without prejudice to which a declaration indicating the patrimonial situation of senior officials must be made public, which must not "include location data or those that are necessary to safeguard the privacy and security of the holders."

Thus, the LTC obliges to make public a statement that indicates the patrimonial situation of the high officials, with the omission of the location data and those that are necessary to safeguard the privacy and security of the holders and leaves it in the hands of the specific regulations of the Register of declarations of assets and interests.

In accordance with article 75.7 of Law 7/1985, of April 2, regulating the bases of the local regime (hereafter, LRBRL), before taking possession of the position, on the occasion of termination and at end of the mandate, as well as when the factual circumstances change, the local representatives and the non-elected members of the Local Government Board must make two statements: one "on causes of possible incompatibility and on any activity that provides them or pueda provide economic income " and another envelope

"your patrimonial assets and participation in companies of all types, with information on the companies in which they participate and on self-assessments of taxes on Income, Patrimony and, where applicable, Companies".

This precept provides that "the annual declarations of assets and activities will be published annually, and in any case at the time of the end of the mandate, in the terms set by the Municipal Statute", and will be entered "in los siguientes Registros: interests, which will have a public

a) The statement on causes of possible incompatibility and activities that provide or may provide economic income, will be registered in the Register of Activities established in each local entity.

b) The declaration of assets and patrimonial rights will be registered in the Register of Patrimonial Assets of each local Entity, in the terms established by its respective statute."

In the area of Catalonia, the Consolidated Text of the Municipal and Local Regime Law of Catalonia, approved by Legislative Decree 2/2003, of April 28, attributes public status to the Register of causes of possible incompatibility and of activities, and specifies that councilors and people who prove a legitimate and direct interest have the right to consult it:

"163.3 The register of interests is under the direct responsibility of the president of the corporation or the member to whom he delegates. The register of causes of possible incompatibility and of activities is public, and the members of the corporation have the right to consult it, as well as all persons who prove a legitimate and direct interest."

These provisions refer but only, in any case, to elected officials and other non-elected members of local corporations.

In attention to these rules, and beyond the provision of publicity of the declarations of possible causes of incompatibility or on any activity that provides or may provide them with economic income and that of patrimonial assets of the local representatives and the non-elected members of the Local Government Board, there is no regulatory provision in the matter of Registers of activity, patrimony and interests that enables the publication of the information on interests contained in the questionnaire model that accompanies the consultation, and taking into account the provisions of the article 56.2 of the mentioned LTC, it would not be possible to publish the document and/or personal information it contains under the protection of the duty of active publicity of the transparency legislation.

This, however, does not remove the fact that there is certain information contained in these documents that must be published, in accordance with the rules of active advertising provided for in the LTC.

Thus, article 11.1 of Law 19/2014 establishes that they must be made public:

"b) Remuneration, compensation and per diems, the activities and assets of the members of the Government, of the senior positions of the Public Administration and of the management staff of public bodies, companies, foundations and consortia, and the compensations that have to be perceived when ceasing to hold office."

For these purposes, local representatives and the holders of higher and managerial bodies, in accordance with the local regime legislation (art. 4.2.b) LTC, would be considered senior positions in the service of the local administration. In turn, they would be considered senior positions in the service of the other public bodies referred to in article 3 LT, the holders or members of governing bodies and managerial positions (art. 4.2.c) LTC.

To the extent that it is necessary to publish on the transparency portal the patrimonial assets of high-ranking officials, the information contained in the "economic interests" apparatus referring to securities, bonds, shares and investments or other financial assets of which they are holders, is information that has to be available to the public and therefore there would be no problem in publishing it, together with the rest of the assets they have. For the purposes of guaranteeing the retention of accounts to citizens, it may be convenient to have information on the name of the company or commercial entity to which the titles or securities belong.

In the same way, to the extent that it is necessary to publish on the transparency portal the activities carried out by senior officials, the information contained in the "professional activities" section referring to the development of private activities by these people, is information which must also be available to citizens, and consequently there would be no inconvenience in publishing it.

Add that article 11.1. d) the LTC obliges to publish "the resolutions issued by the competent body to investigate and resolve the files relating to the declarations of activities, assets and interests of high-ranking officials and the registration in the corresponding registers, in application of the regulations on incompatibilities of the positions."

This Authority dealt with the issue of the publication of the compatibility resolutions in CNS opinions 51/2014 and 73/2016 available on the Authority's website (www.apd.cat). In these opinions it is concluded that in cases where the compatibility of a secondary activity has been authorized or recognized, the transparency legislation, in consideration of the prevailing public interest, would enable the publication of identifying data (name, surname and position) of the affected person, as well as the activity and the company or entity where it is carried out, unless the affected person is in a situation of special protection, a circumstance that would justify carrying out a different weighting.

Warn that the disclosure of information on the assets and professional activities of high-ranking officials cannot in any case be extended to the assets that they may have or the professional activities that may be carried out by people in the declarant's family environment. These statements that may appear in the questionnaire are not subject to the active advertising regime provided for in the transparency regulations and, therefore, their publication cannot be considered lawful for the purposes of the personal data protection regulations.

Finally, note that as indicated by the consulting entity, in the letter addressed to the affected people, they are informed that the documents they sign (document of adhesion to the code and the questionnaire attached to the code of conduct) are confidential and that they will be guarded by the Transparency Agency.

Remember that in accordance with article 13.1 of the RGPD, when personal data is obtained from the interested party, the data controller must inform them, among other things, of "c) the purposes of treatment to which the personal data is intended and the legal basis of the treatment." Apparatus 3 of this same precept provides that "when the person responsible for the treatment

projects the further processing of personal data for a purpose other than that for which they were collected, will provide the interested party with prior to said further processing, information on that other purpose and any additional information relevant to the tenor of section 2."

Taking this into account, in order to avoid the generation of false expectations of privacy, it would be necessary to inform the people who submitted the declaration about all the points required by article 13.1 of the RGPD, including the fact of subsequent publication in corporate website of the information collected in these documents referring to properties in securities, bonds, shares, as well as information on the professional activities they carry out.

It is also recalled that the information published must be truthful and permanently updated (article 6.1.a) ib) Law 19/2014).

CONCLUSION

In view of articles 54, and 55.1 and 3 of the LTC, it is not justified to publish the information on senior officials who have adhered to the entity's Code of Ethics and Conduct and those who have not.

Article 11. 1. b) of the LTC would enable the publication of information related to assets (securities, bonds, financial assets, etc.) owned by senior officials, as well as information on the professional activities they carry out.

Barcelona, February 13, 2019