

CNS 35/2019

Opinion in relation to the query made by a city council on whether a councilor can access municipal administrative files through a representative

#### Background

A letter from a city council is presented to the Catalan Data Protection Authority in which it is requested that the Authority issue an opinion to assess whether a councilor can access municipal administrative files through a representative, without being- the councilor is present at the time of the consultation.

Having analyzed the query, which is not accompanied by any other documentation, and in accordance with the report of the Legal Adviser, I issue the following opinion:

#### Legal Foundations

I

(...)

II

At the outset and in order to situate the question subject to consultation, it should be remembered that the right of access to public information of elected officials is not governed by the general regime that regulates the right of access to public information recognized by all citizens by article 105.b) EC and deployed by Law 19/2013, of December 9, on transparency, access to public information and good governance (LT) and, in Catalonia, by Law 19/2014, of September 29, on transparency, access to public information and good governance (LTC).

The right of access to information on elected officials, both members of Parliament and councilors, is part of the essential content of the "ius in officium" or representative and parliamentary function recognized by Article 23.2 EC according to which all citizens "they have the right to access public functions and positions under conditions of equality, with the requirements set forth by law."

Thus STC 161/1988, although referring to elected officials of a parliamentary assembly, already stated:

"It is important to point out, however, that the right possibly directly affected by the impugned act is not the one cited by the actors, but the one stated in no. 2 of the same art. 23 of the Constitution, a precept that also recognizes to all citizens the "right to equal access to public functions and positions, with the requirements set forth by law", because this precept guarantees,

not only equal access to public functions and positions, but also that those who have access to them remain in them without illegitimate disturbances and perform them in accordance with what the law provides - STC 32/1985, of March 6 (RTC 1985\32)-, since in another case the constitutional norm would lose all effectiveness if, respected the access to the function or public position under equal conditions, its exercise could be mediated or prevented without legal remedy.

Affirmed by the four appellant Deputies that the resolution of the Bureau has deprived them of the right to "collect the data, reports and documents that are in the power of the Regional Administration", which is conferred by art. 12.2 of the Rules of Courts leaves no doubt that the fundamental right that may be affected is the one guaranteed by said art. 23.2 of the Constitution since the reported deprivation would, in its case, prevent the exercise of a faculty that a rule with force of law in its material sense - the Regulation of the Courts - attributes to them in their capacity as holders of the public office of Deputies."

As stated in STC 32/2017, "we are faced with "an individual right" of the Deputies that is integrated into the status of the office; right that: a) empowers them to collect information from the Regional Administration or "from the Central Administration, Local and other institutions in the territorial scope of Castilla-La Mancha" (art. 13.3); b) they are granted "for the best fulfillment of their functions"; c) its specific purpose is "to know certain facts and situations, as well as the administrative documents that evidence them, relating to the activity of public administrations; information that may well exhaust its effects in obtaining it or be instrumental and serve later so that the Deputy who receives it, or his parliamentary group, carry out a judgment or assessment on that specific activity and the Government's policy, using other instruments of control" ( STC 203/2001 (RTC 2001, 203) , FJ 3); yd) whose exercise only requires transferring the data to the President of the Cortes who will provided for in article 32.1.4 (art. 13.2 of the Regulation) and that the information and documentation be necessary for the development of its tasks (art. 13.1 of the Regulation)."

It is, therefore, a right or faculty inherent in the exercise of the position, given that the guarantee provided for in Article 23.2 CE covers not only the possibility of accessing the position but also that of being able to exercise it in conditions that allow it to be done effectively. The access of elected officials to the information held by the public administration that, by virtue of their mandate, they must direct, manage or control is essential to be able to fulfill the mission entrusted to them. And this explains the greater intensity that the legal system recognizes in the right of access of elected officials compared to the right

This means that the considerations included in this opinion must be understood as referring exclusively to the access of councilors (and, where applicable, parliamentarians) to public information and that they cannot be extrapolated to any other citizen who exercises the right of access to public information recognized by law.

### III

In a manner consistent with what has just been explained, the first additional provision, section 2, of the LTC, establishes that "access to public information in matters that have established a special access regime is regulated by their specific regulations and, additionally, by this law."

In the case at hand, given that the query refers to the possibility of access to the information of a person who would act as a representative of a councillor, the provisions established by the local regime legislation are applicable, fundamentally, Law 7/1085, of April 2, regulating the bases of the local regime (LRBRL) and the revised Text of the Municipal and Local Government Law of Catalonia (hereinafter, TRLMRLC), approved by Legislative Decree 2 /2003, regarding councillors' access to municipal information.

Obviously, the representative, as a citizen, also has a recognized right of access to public information, but this issue is not analyzed in this opinion, but only the possibility of exercising the powers attributed to councillors by representation.

Article 4.1 of 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 the concept of personal data as "all information about an identified or identifiable natural person ("the data subject")", and considers as an identifiable natural person "any person whose identity can be determined, directly or indirectly, in particular by means of an identifier, as for example a number, an identification number, location data, an online identifier or one or several elements of the physical, physiological, genetic, psychological, economic, cultural or social identity of said person."

It is foreseeable that the information to which you want to access may include personal information. And in this case, the answer given to the query will affect the possibility that the representative can access personal data or not. For this reason, the regulations for the protection of personal data must be taken into account.

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 transfer of personal data to be lawful, one of the legal bases provided for in article 6 RGPD must be met. In the case of special categories of data, the provisions of Article 9 RGPD must also be taken into account.

Article 6.1 RGPD provides that in order to carry out the processing of personal data, it is necessary to have a legal basis that legitimizes this processing, either the consent of the affected person, or any of the other circumstances provided for in the same precept, such as that "the treatment is necessary for the fulfillment of a legal obligation applicable to the person responsible for the treatment" (letter c).

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. (...)"

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 Spanish Constitution, that the rule of development, to be about a fundamental right, has the status of law.

Thus, the new Organic Law 3/2018, of December 5, on Protection of Personal Data and guarantee of digital rights (hereafter LOPDGDD), provides in article 8 that "1. The treatment 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 this is provided for 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."

In the case at hand, the specific rule that regulates the right of access of councilors is the local regime regulations, specifically Law 7/1985, of April 2, regulating the bases of the local regime (LRBRL) and the revised text of the Municipal and Local Regime Law of Catalonia (TRLMRLC), approved by Legislative Decree 2/2003, of April 28.

Article 77.1 of the LRBRL provides the following:

"All the members of the local Corporations have the right to obtain from the Mayor or President or the Government Commission any background, data or information available to the Corporation's services and which are necessary for the development of its function.

The request to exercise the right contained in the previous paragraph must be resolved motivatedly within five natural days following the one in which it was presented.

In Catalonia, you must also take into account article 164 of the TRLMRLC, according to which all members of local corporations have the right to obtain data or information held by the corporation's services:

"1 All members of local corporations have the right to obtain from the mayor or mayoress or the president or the governing commission all the background information,

the data or information that are in the possession of the corporation's services and are necessary for the development of their function.

**2 Corporation services must provide information directly to corporation members when:**

**a) Exercise delegated functions and the information refers to matters of their own responsibility. b) These are matters included in the agenda of the sessions of the collegiate bodies of which they are members.**

**c) It is about access to information or documentation of the local corporation that is freely accessible to citizens.**

**3 In the other cases, the request for information is understood as accepted by administrative silence if a negative resolution is not issued within four days from the date of presentation of the request. In any case, the negative decision must be motivated, and can only be based on the following assumptions:**

**a) When the knowledge or dissemination of the information may violate the constitutional right to honor, personal or family privacy or one's image.**

**b) When it comes to matters affected by the general legislation on official secrets or summary secrecy.**

**(...)"**

Of course, when the provision of information may come into conflict with another right, in this case a fundamental right, such as the right to the protection of personal data, it will be necessary to make a weighting, due to the requirement not only of the principle of legality but also that of data minimization (Article 5 RGPD), before giving access to the data.

With regard to this weighting, it is necessary to take into account several elements, among others, the connection between the information requested and the exercise of the specific legitimate functions that the law attributes to councilors, the type or categories of information personnel who could be the subject of communication, the potential number of people affected and the consequences that may arise for these people.

#### IV

As has been explained, in the case of exercise of the right of access by councilors, it is the exercise of a right inherent in the position. Therefore, like the rest of the rights and attributions inherent in the public office held (right to attend meetings, right to vote, etc.) it cannot be exercised through a representative but must be exercised directly by the councillor. It is a recognized right intuitive personae.

Therefore, the representation regime provided for in article 5 of Law 39/2015, of October 1, on common administrative procedure of public administrations, would not apply. The councilor must directly sign the request for documentation to which access is sought.

Now, having said that, it is also necessary to recognize that it is not unusual for councilors to be assisted by other people, in the capacity of advisers or collaborators, in the exercise of their functions, whose function is it can also extend to the analysis of the information received by the councilor following a request for information from the municipal administration. In some cases, in municipalities of sizes that justify it, it is often the corporation itself that makes it easier for municipal groups to hire these advisers or collaborators. It does not seem possible to prevent the access of these collaborators to the information that is consulted or received, as already recognized by STC 181/1989, in relation to the advisers of the parliamentary groups.

We must not forget, in any case, that the same article 164.5 of the TRLMRLC expressly provides that the councilor has the right to obtain a copy of the documentation to which he has access.

In accordance with this, these advisers or collaborators who would act under the direction of the councilor or municipal group, should not only be able to have access to the copies of the documentation received by the councilor, but also could, in the event that in to exercise the right the councilor has chosen to materialize access through direct consultation, to directly access the documentation requested by the councilor when he authorizes it.

All this without prejudice to the duty of confidentiality to which we will refer in the following legal basis.

v

Without prejudice to the possibility that access to information by the councilor may also lead to access by other people who act as advisers or collaborators, the right of access of all councilors to information must always be governed, among others, by the duty of reservation, in the terms of article 164.6 of the TRLMRLC, cited, according to which:

"Members of the corporation must respect the confidentiality of the information to which they have access by virtue of their position if the fact of publishing it could harm the interests of the local entity or third parties."

According to this article, the members of the Corporation have the duty to keep a reservation in relation to the information provided to them to make possible the development of their function.

This duty of secrecy is also explicitly provided for in article 5.1.f) of the RGPD by establishing that the data must be treated "in such a way as to guarantee an adequate security of personal data, including the protection against the treatment unauthorized or illegal and against accidental loss, destruction or damage, through the application of appropriate technical or organizational measures ("integrity and confidentiality").

Forecast that is completed with what is provided in article 29 of the RGPD which establishes that personnel who act under the authority of the person in charge or the person in charge and have access to data must always do so following the instructions of the person in charge unless is obliged to carry out some other action in accordance with the law of the Union or the Member States, and article 32.1.b) of the same Regulation, which requires the person in charge to adopt the necessary technical and organizational measures to guarantee confidentiality . One of these measures should, in any case, be the signature of a commitment of confidentiality by the advisers or collaborators, unless they are already bound by a statutory relationship that entails this

In the event that these advisers or collaborators do not act under the authority of the person in charge, they must constitute themselves as a person in charge of the treatment (art. 4.8 RGPD) in accordance with the requirements established in article 28 RGPD, among for which there is also the need to establish the corresponding confidentiality commitments (28.3.b) RGPD).

Finally, in relation to the duty of secrecy, it should also be remembered that according to the provisions of the Penal Code (articles 197 and 198), the public authority or official who, outside of the cases permitted by law and by virtue of his office, disseminates , reveals or gives certain data to third parties, would be carrying out conduct that could constitute the crime of discovery and disclosure of secrets.

In accordance with the considerations made in these legal foundations in relation to the consultation on whether a councilor can access municipal administrative files through a representative, the following are made,

## Conclusions

Although the councilors' right of access must be carried out directly by the councilor himself, it is necessary to recognize the possibility that people who act as advisers or collaborators of the councilors or municipal groups can access the information provided following access, guaranteeing in any case the confidentiality of the information to which they have access.

Barcelona, December 4, 2019