

Ref. CNS 44/2019

Opinion in relation to the query made by a City Council regarding the request for access to different documents of the call for a municipal kindergarten teacher position

A request for an opinion from a City Council is submitted to the Catalan Data Protection Authority, regarding a request for access to documentation relating to the call for a position as a teacher in the municipal kindergarten.

Specifically, the City Council refers to a request for access to certain documentation of the selection process for the provision of an educator position in the municipal kindergarten, according to the bases on which it reference the query.

According to the query, the applicant would have requested access to the following documents:

"From the first exercise-Questionnaire: copy of the questionnaire (with the correct answers). From the second exercise-Development of questions proposed by the Court: Copy of the two exercises with the highest score."

In the same letter, the City Council submits to this Authority several queries on other issues, which will be the subject of analysis in other opinions of the Authority (Opinions CNS 45/2019 and CNS 46/2019).

Analyzed the query, which is not accompanied by other documentation, and seen the report of the Advisory Board Legally, the following is ruled:

I

(...)

II

Regulation (EU) 2016/679, of the Parliament and of the European Council, of April 27, 2016, General Data Protection (hereinafter, RGPD), defines personal data as any information about an identified or identifiable natural person "the interested party"; "an identifiable natural person shall be considered any person whose identity can be determined, directly or indirectly, in particular by means of an identifier, such as a name, an identification number, location data, an online identifier or one or more elements specific to the physical, physiological, genetic, psychological, economic, cultural or social identity of this person" (art. 4.1 RGPD).

Therefore, the communication of information contained in a personnel selection file carried out by the City Council, to a citizen, is a processing of personal data (art. 4.2 RGPD) subject to the principles and guarantees of the personal data protection regulations (RGPD, and the Law

organic law 3/2018, of December 5, on the protection of personal data and the guarantee of digital rights (LOPDGDD)).

For a treatment to be lawful (art. 5.1 RGD) it must be based on one of the legal bases established by article 6.1 of the RGD, among which, with regard to the treatments carried out by public administrations, it is worth highlighting that provided for in letter c), "the treatment is necessary for the fulfillment of a legal obligation applicable to the person responsible for the treatment", and in letter e), "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 data controller".

In the case at hand, both the transparency legislation (Law 19/2013, of December 9, and Law 19/2014, of December 29, on transparency, access to public information and good governance (LTC)), as the administrative procedure legislation (Law 39/2015, of October 1, on the common administrative procedure of public administrations and Law 26/2010, of August 3, on the legal regime and procedure of public administrations of Catalonia), regulate the circumstances of citizens' access to public information and determine the terms in which access can occur and can be lawful.

At the time of issuing this opinion, the City Council's website does not include information on the selective process subject to consultation.

However, the available information on the selection process in question (www.cido.diba.cat), includes the list of people participating in the process, and that of the participants who have passed the opposition and competition phases, with the corresponding scores, as well as the list with the final rating and the list of those approved without a place, which go on to integrate a job board. According to the available information, the City Council would have published on the notice board the Resolution of the call for the provision of the position subject to consultation, in which the Qualifying Court proposes to the mayor's office the hiring of the person who would have obtained higher score. In the same Resolution it is foreseen that a total of six applicants "approved without a place" will become part of a job board.

From the available information it appears, on the one hand, that the information requester is not one of the participants in the selection process and, on the other hand, that the selection process would have already ended and, consequently, the application access request is governed by the provisions of the legislation on the transparency of public administrations, to which we refer below.

III

Article 18 of Law 19/2014 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 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".

State Law 19/2013, of December 9, on transparency, access to public information and good governance, is pronounced in similar terms, in its articles 12 (right of access to public information) and 13 (definition of public information).

Therefore, the record of the call for a selective process subject to consultation is public information, for the purposes of transparency legislation.

In accordance with article 20 et seq. of the LTC, the right of access to public information may be denied or restricted for the reasons expressly established in the laws. Specifically, and with regard to information that contains personal data, it is necessary to assess whether or not the right to data protection of the affected person justifies the limitation of the right of access to public information regulated in the LTC .

It should be borne in mind that the personnel selection procedures of the public administrations are competitive procedures, based on the principles of equality, merit and ability, transparency and publicity.

According to the available information, the selection process regarding the information requested refers to a competitive competition for the provision of a municipal kindergarten educator position, in a fixed employment regime.

The Royal Legislative Decree 5/2015, of October 30, which approves the revised text of the Law on the Basic Statute of the Public Employee (EBEP), applicable to civil servants and, in which as appropriate, to the labor staff at the service of the Administrations of the local entities (art. 2.1.c) EBEP), establishes these principles in article 55.1: "All citizens have the right to access to public employment in accordance with the constitutional principles of equality, merit and capacity, and in accordance with the provisions of this Statute and the rest of the legal system."

According to the same article 55, paragraph 2, of the EBEP:

"2. The Public Administrations, entities and organisms referred to in article 2 of this Statute will select their official and labor personnel through procedures that guarantee the constitutional principles expressed above, as well as those established below:

a) Publicity of calls and their bases. b)
Transparency. (...)."

In the same sense, article 91.2 of Law 7/1985, of April 2, regulating the Basics of the Local Government, to which we refer.

For its part, the Municipal and Local Regime Law of Catalonia (Legislative Decree 2/2003, of April 28), provides the following in article 287.2:

"According to their public employment offers, local entities must select staff by means of public invitations and competition, opposition and competition systems

free opposition, in which the principles of equality, merit, capacity and publicity must be guaranteed."

According to Decree 214/1990, of July 30, which approves the Regulation of personnel in the service of local entities (RPEL), the hiring of permanent or fixed labor personnel requires, among others: "Call public with an expression of the selection modality adopted, selection bases and full guarantee of the constitutional principles of equal opportunities, merit, ability and publicity." (art. 18.2.b) RPEL).

In relation to the workforce, by applying the principle of publicity, article 92 of the RPEL provides that: "Once the call has been published in the Official Gazette of the Generalitat of Catalonia and the Official Gazette of the province, the rest of 'announcements must be made public at the headquarters of the local corporation, without prejudice to the provisions of article 78 of this Regulation. "

According to article 78 of the RPEL, cited: "Once the deadline for the presentation of instances has ended, the president of the corporation, or the authority to which he has delegated, must issue a resolution within the maximum term of a month and must declare the list of admitted and excluded approved. In the aforementioned resolution, the places where the complete certified lists of admitted and excluded applicants are exposed to the public must be indicated. (...)"

According to article 80 of the RPEL:

"1 The courts or selection bodies must make public, at the place where each test is carried out, the list of passers in order of score.

2 Once the tests have been completed, the list of passers must be made public in order of score, (...).

(...).

4 The final score of the selective tests and the list of those who have passed must be published on the notice board of the local body and ordinary appeals may be lodged against the result (...)"

On the other hand, it should be borne in mind that article 9.1.e) of the LTC establishes that they must be published, on the transparency portal or on the corresponding electronic headquarters "The calls and the results of the selective processes of provision and staff promotion", provision that is applicable to the case at hand, in relation to which, as has been pointed out, the City Council would have made public the corresponding information (among others, lists of people admitted to the selection process, score obtained in the different exercises of the opposition phase; score obtained by the participants in the competition phase, as well as the final qualification of all participants, and the hiring proposal of the participant with the highest score obtained).

Given these regulatory provisions, it is clear that citizens must have access to certain information about the selective processes called by the Public Administrations, either through active advertising (art. 9.1.e) LTC), by application of the principle of advertising or, where applicable, following a request for access to public information, in order to verify that the

procedure to cover a specific job in the public administration, has been processed with full respect for the guiding principles of this type of procedure.

IV

Having said that, the applicant requests, first of all: "From the first exercise-Questionnaire: copy of the questionnaire (with the correct answers)".

Regarding this information, given the request and the information provided, it seems clear that the applicant is not asking to know the answer to the questionnaire given by certain participants, but would only ask for "the questionnaire with the correct answers".

From the point of view of personal data protection regulations, there would be no problem in giving access to the copy of the questionnaire with the correct answers, since this documentation does not contain personal data of the people participating in the process selective

Secondly, the applicant asks to know: "From the second exercise - Development of questions proposed by the Court: Copy of the two exercises with the highest score."

As has been said, the City Council would have disseminated, among others, the list corresponding to this second exercise, indicating the names and surnames of the participants and the score obtained, as well as the resolution with the identity of the person hired and of people who, having passed the selection process ("passed without a place"), become part

Taking this into account, it is obvious that having access to the content of the two exams with the highest score in the second exercise would mean the communication of personal information of two clearly identifiable natural persons, therefore subject to the principles and guarantees of the data protection regulations .

It should be noted that, from the perspective of the protection of personal data, facilitating access to public information prior to the dissociation of the personal data contained therein (art. 4.5 RGPD), in such a way that it is not possible to identify the affected persons, is, in fact, an option expressly provided for in article 15.4 of Law 19/2013, according to which: "The established in sections above if access is effected prior to the dissociation of personal data in such a way as to prevent the identification of the affected persons."

As this Authority has done in the past, in the resolution of access requests the option to previously dissociate personal data should be the general rule, as long as the personal data were not relevant to satisfy the public or private interest that motivates the 'access to the information in question.

However, it should be borne in mind that if access is given to the content of the two exercises with the highest score, even if the identity of the two people affected, and even the score obtained, were hidden, given that the City Council made publish in due course the list of candidates with the score obtained by each of them in the second exercise, this would

the possibility of providing access to the information in an anonymized or pseudonymized manner is not feasible in practice, since the applicant could identify the two affected natural persons without disproportionate effort.

Having said that, access to the content of the two exercises with the highest score therefore requires a prior weighting between the different rights and interests at stake, in accordance with the provisions of article 24.2 LTC:

"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."

The applicant is not listed in the available documentation as a participant in the selection process.

It is worth saying that, in the event that the applicant had participated in the selection process and had not been selected, he would have the status of an interested party in the selection process that was carried out at the time and, once concluded the procedure, this condition would grant him a reinforced or privileged right of access, unlike other potential applicants for information who have not participated in said selective process.

In this sense, as this Authority has done on previous occasions (Report IAI 44/2017, Report IAI 49/2918, IAI 32/2019, or Opinion CNS 25/2019, among others, available on the web: www.apd.cat), in the event that the person requesting access to information has participated in the selection process, this may be decisive for the weighting effects of article 24.2 LTC.

However, as has been pointed out, this is not the case we are dealing with, since there is no record that the applicant participated in the selection process.

Given the information provided, it seems that the applicant would not have specified any other specific reason why he would be interested in obtaining access to a copy of the two exercises with the highest score, a fact that, despite not being strictly required (article 18.2 LTC), could be particularly relevant for the purposes of making a correct weighting, as provided for in article 24.2.b) LTC.

Therefore, for the purposes of weighing the applicant's possible access to the content of the exams of two participants in the selection process, it is appropriate to take into account the following elements.

On the one hand, it should be borne in mind that, for the purposes of transparency, it can certainly be relevant to know the score obtained by each participant in each phase of the selection process, as well as the final score and the hiring of the person or people participating.

In this sense, the applicable regulations themselves prevail over the public interest in access to the identity of the people who participate in selective processes of the Public Administrations and the result of the process, against the right to privacy of these participants.

However, as can be seen from the information available, the City Council would have already made public the lists with the results and scores obtained by the participants in the opposition and competition phases, information that any person, including the applicant, has been able to know, and that in principle it may be sufficient to comply with the general purpose of transparency and control of a selective process by citizens.

On the other hand, it must be taken into account that the participants in a selective process know, from the moment of the call, which personal information may be the subject of dissemination by application of the principle of publicity. In other words, any participant knows that both their participation in the process and the results obtained can be known as required by the principle of publicity.

However, beyond this, the participants may also have a certain expectation of privacy regarding the rest of the personal information that affects their participation in the selection process (curriculum vitae, content of the interviews and tests carried out, psychotechnical tests ...). At least, they can have this expectation in the sense that this information - which goes beyond what the principle of publicity would require to be made public - must not be known by any person outside the selective process who requests it.

In this sense, from the perspective of the rights and interests of the people affected (the two participants who obtained the best score in the exercise), it should be borne in mind that access to the content of the tests carried out would be a rather invasive measure of your privacy, which could affect both the unfolding of your life in the personal sphere, as well as in the social or professional sphere.

Although knowing this information (content of the tests carried out) could be relevant to achieve the purpose that a participating person who has not been selected could seek, this relevance does not coincide with regard to the applicant, so that access could suppose a grievance in the private sphere of the two people affected, derived from the communication of their data without a purpose justifying it. At the very least, access does not seem sufficiently justified for a general purpose of transparency.

For all the above, given that the person requesting the personal information (the content of the two exercises with the highest score), has not participated in the selection process, nor does he specify any other reason that may be relevant to the effects of weighting (art. 24.2 LTC), from the perspective of data protection regulations, it does not seem sufficiently justified to give him access and a copy of the content of the two exercises with the highest score, which he claims.

This, unless other weighting elements that are not on record with this Authority and which, therefore, cannot be the subject of assessment, may come into play.

In accordance with the considerations made in this opinion in relation to the query raised, the following are made,

Conclusions

Personal data protection regulations do not prevent the applicant from being given access to a copy of the questionnaire with the correct answers, since this documentation does not contain data on the people participating in the selection process.

Given that the person requesting the personal information (the content of the two exercises with the highest score), would not have participated in the selection process or specify any other reason that may be relevant for the purposes of weighting (art. 24.2 LTC), from the perspective of data protection regulations, it does not seem sufficiently justified to communicate the requested personal information.

This, unless other weighting elements that are not on record with this Authority and which, therefore, cannot be the subject of assessment, may come into play.

Barcelona, 2 October 2019