

CNS 57/2019

Opinion on the query made by a city council on the request of an official for access to the information on the amounts received by other workers in the concept of productivity supplement and gratuities.

A city council formulates a query in relation to a civil servant's request for access to information on the amounts received by other workers as productivity supplements and gratuities.

In particular, he states that an official of the Local Police has requested that he be provided with the nominal list of all the personnel attached to his unit, that is, the Local Police of Torredembarra, in which they appear, by month and in the form separately, the amounts received in terms of productivity and those received in terms of gratuities, since January 2019.

After analyzing the query, and in accordance with the report of the Legal Counsel, I issue the following opinion.

I

(...)

II

The query raises the question of the possibility of providing an official of the Local Police, a nominal list of all the staff of this department, which includes the monthly amounts received by each of these people as productivity supplements and gratuities , since January 2019.

The remuneration data of municipal workers are personal data, defined in 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 to the processing of personal data (hereinafter, RGPD), as "any identifiable natural person (the interested party)", and considers as an identifiable natural person "any person whose identity can be determined, directly or indirectly , in particular by means of an identifier, such as a number, an identification number, location data, an online identifier or one or more elements of the physical, physiological, genetic, psychological, economic, cultural or social identity of said person."

Article 5.1.a) of the RGD establishes that all processing of personal data must be lawful, fair and transparent in relation to the interested party (principle of lawfulness, loyalty and transparency). In accordance with article 6.1 of the RGD, in order to carry out a treatment, it is necessary to have a legal basis that legitimizes this treatment, either the consent of the affected person, or any of the other circumstances, 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 mission carried out in the public interest or in the exercise of public powers conferred on the person responsible for treatment " (letter e).

As can be seen from article 6.3 of the RGD and expressly included in article 8 of Organic Law 3/2018, of December 5, on the protection of personal data and guarantee of digital rights (hereafter LOPDGDD), the treatment of data can only be considered based on these legal bases of article 6.1. c) and e) of the RGD when so established by a rule with the rank of law.

On the other hand, article 86 RGD provides that "The personal data of official documents in the possession of some public authority or public body or a private entity for the performance of a mission in public interest may be communicated by said authority, body or entity in accordance with the Law of the Union or of the Member States that applies to them in order to reconcile public access to official documents with the right to the protection of personal data under this Regulation."

Law 19/2014, of December 29, 2014, on transparency, access to information and good governance (hereafter LTC), aims to regulate and guarantee the transparency of public activity, and provides in article 18 that "people have the right to access public information, referred to in article 2.b, as an individual or in the name and representation of any legally constituted legal person" (paragraph 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 (hereafter LTE), in its articles 12 (right of access to public information) is pronounced in similar terms and 13 (public information).

The remuneration information requested is "public" for the purposes of article 2.b) of the LTC and, therefore, remains subject to the right of access (art. 18 of the LTC). In accordance with article 20 and s. of the LTC, this right may be denied or restricted for the reasons expressly established in the law.

Given that what is being requested is the remunerative personal data of municipal workers (members of the local police), it is necessary to assess whether the right to data protection of these people can justify or not the limitation of the right of access to information public recognized in article 18 LTC.

Considering that the information requested does not affect data considered particularly protected in the terms provided for in article 23 of the LTC, access to said information requires a reasoned weighting between the public interest in the knowledge of said information and the right to data protection of the affected persons, in accordance with the criteria provided for in 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. (...)."

Article 35 of Law 16/1991, of July 10, on local police, provides:

"1. Local police officers have the right to a fair remuneration that takes into account the level of training, the regime of incompatibilities, the dedication and risk involved in the profession, the specificity of the working hours and the peculiar structure of the body. This remuneration must be composed, at least, of a part corresponding to the basic remuneration and a part corresponding to the complementary ones.

2. The basic salaries must have the same structure and an identical amount as those established in general for the staff in the service of the public service.

3. It is up to the plenary session of the respective local corporation to set the supplementary remuneration, taking into account the concepts set out in section 1, within the limits established by current legislation."

Article 22.3 of Royal Legislative Decree 5/2015, of October 30, which approves the revised text of the Law on the basic statute of the public employee (hereafter EBEP), defines the complementary remunerations such as those that "remunerate the characteristics of the jobs, the professional career or the performance, the performance or the results achieved by the official."

Pursuant to article 24 of the EBEP, the amount and structure of the complementary remuneration of civil servants must be established by the corresponding laws of each Public Administration, taking into account, among others, the following factors: a) The progression achieved by the official within the administrative career system; b) The special technical difficulty, responsibility, dedication, incompatibility required for the performance of certain jobs or the conditions in which the work is carried out; c) The degree of interest, the initiative or the effort with which the official does his work and the performance or the results obtained id) The extraordinary services provided outside the normal working

Article 103 of Legislative Decree 1/1997, of October 31, which approves the recasting in a Single text of the precepts of certain legal texts in force in Catalonia in the matter of

civil service, refers to productivity supplements and gratuities in the following terms:

"1. These are complementary payments:

(...)

c) The productivity supplement, the purpose of which is to reward special performance, extraordinary activity and the interest or initiative with which the official carries out his work.

The overall amount will be set for each program and administrative body through a percentage on total personnel costs, which will be determined by the Budget Law.

The Budget Law will also establish the criteria for the distribution of this supplement. The person responsible for the management of each spending program, within the corresponding budget allocations, will determine, in accordance with the regulations established by the Budget Law, the individual amount that corresponds to each official. The amounts received by each official for this concept will be public knowledge for the other officials of the department or the organization concerned and for the union representatives.

By regulation, each year, in accordance with the Budget Law, the technical evaluation criteria for the factors that determine the distribution will be established, as well as the participation formulas for the representatives of the staff involved.

d) Gratuities for extraordinary services provided outside the normal working day, which in no case can be fixed in amount or periodic in the right to receive them. Overtime cannot normally exceed the limit established by regulation. Extraordinary services can be compensated financially or with free hours of service.

2. The amount and the conditions to be able to receive the indemnities that due to service correspond to civil servants will be set by regulation."

In similar terms, Decree 214/1990, of July 30, is issued, which approves the Regulations for personnel in the service of local entities (articles 171 et seq.) and articles 5 and 6 of Royal Decree 61/1986, of April 25, which establishes the remuneration regime for the officials of the Local Administration.

In accordance with articles 172.4 and 173 of Decree 214/1990, it is up to the plenary session of each corporation to determine in the budget the overall amount destined to the allocation of productivity supplements and gratuities to civil servants within the maximum limits indicated by the article 175.2.b) of this Regulation.

And as can be seen from articles 172.5 and 174 of this same Decree, it is up to the mayor or president of the corporation to distribute this amount between the different programs or areas and the individual allocation of the productivity supplement, with subject to the criteria that, if applicable, the plenary has established, without prejudice to the delegations that may confer

in accordance with Law 8/1987, of April 15, municipal and local regime of Catalonia, as well as the individual allocation of gratuities.

It follows from all of this that the productivity supplement has a markedly personal character, although in accordance with the legal prescriptions, its appreciation must be carried out based on objective circumstances directly related to the development of the workplace and the objectives assigned to it, and their quantification must be adjusted to the criteria approved by the Plenary.

Gratuities respond to extraordinary services performed outside the working day, with which they are linked to the development of these activities by the specific person, and as in the previous case, they must also obey the criteria set by the Plenum of the Corporation.

The transparency legislation obliges public administrations to publish the remuneration of public employees in two different ways: one, through the individualized publication of "remunerations, compensations and allowances, activities and assets, remunerations, compensations and allowances, activities and the assets of the members of the Government, of the senior positions of the Public Administration and of the management staff of public bodies, societies, foundations and consortia, and the compensations that they must stop receiving when they stop exercising the position. " (art. 11.1.b) LTC); the other, through the publication of "the general information on the remunerations, compensations and per diems received by public employees, grouped according to the levels and bodies".

It is a criterion maintained by this Authority in the matter of access to the remuneration information of public employees in previous reports that the provisions of article 11.1.b) LTC can be extended with respect to requests for access to the information of the personnel who occupy positions of special trust, of special responsibility within the organization or at a high level in the entity's hierarchy, of free appointment, or that entail a high level of responsibility.

This could be the case of the head of the local police force, who, under the command of the mayor or the person to whom he delegates, exercises immediate command of the force (article 26.1 of Law 16/1991, of July 10, from the local police). The head of the police has the following duties: "a) Direct, coordinate and supervise the operations of the body, and also the administrative activities, to ensure their effectiveness. b) Assess the needs of human and material resources and formulate the relevant proposals. c) Transform into concrete orders the guidelines for the objectives to be achieved, received from the mayor or the office to which he delegates. d) Inform the mayor, or the position to which he delegates, of the operation of the service. e) Fulfill any other function attributed to it by the body's municipal regulations (Article 27 of Law 16/1991).

The control of the use that the administration can make of this type of emoluments linked to people who hold positions with a high level of responsibility and also high levels of remuneration, can be relevant for the purposes of transparency. In this sense, their situation would be comparable to that of managerial positions (considered senior positions for the purposes of article 4.1.b) and 11.1.b) of the LTC). Access to this information would allow citizens to evaluate and form a critical opinion of the management of human resources carried out by the City Council, with respect to remuneration concepts where the award is based on aspects of discretion, an issue that reinforces the need for transparency.

From the point of view of the affected person, it is true that the disclosure of information on the salary supplements received could facilitate the obtaining of an economic profile on that person. Even so, when it comes to employees or public officials who occupy positions with a high level of responsibility, which tend to bring with them high levels of remuneration, they must foresee the possibility that citizens can access through the exercising the right of access to information about all their remuneration, whatever the concept by which they perceive it, and not only with respect to those related to the destination or specific supplement whose disclosure is planned for all public workplaces.

Taking this into account, it does not seem that there could be any inconvenience in handing over to the worker who requests it, the information on the monthly amounts received in addition to productivity and gratuities from the head of the local police force.

IV

Beyond the access that any citizen could have regarding the retributive information that the highest responsible person of the body could perceive, for the rest of the staff it is relevant in this case that the person requesting the information is an official of the same affected unit or department.

The private or particular dimension of the right of access to public information is specified by allowing people to access information that may be of interest to their sphere of particular interests and in this sense, the purpose of access plays an essential role when weighing between the two rights at stake.

Although they do not specify the reasons why it is important to have the information, the truth is that the individual assignment of these supplements to each worker ultimately depends on the Mayor. Although it must obey previously set objective criteria, its granting is based on aspects of discretion, complying, of course, with the principles of transparency, objectivity, impartiality and non-discrimination. This component of discretion when it comes to distributing among the workers, the global amounts given in the budget, undoubtedly reinforces the need for transparency.

In this sense, and for the purposes of the affected worker being able to check that the remuneration received by the rest of his colleagues has been allocated following the criteria and guiding principles of the public service, obtaining the requested information may be relevant.

From the point of view of the affected workers, as has been pointed out, it is true that the disclosure of information on the salary supplements received could facilitate the obtaining of an economic profile on the affected people, especially considering that the rest of the supplements associated not to the worker but to the workplace (destination and specific supplement), are part of the LRT, which means that anyone can access in a relatively easy way the amounts assigned to the respective workplaces to these two concepts (destination and specific supplement), either through the RLT itself or by relating the information on the group and category of a specific position contained in the LRLT with the amounts approved in the respective budget laws for this group or category

In the case of the productivity supplement, article 103.1 c) of Legislative Decree 1/1997, and in the same sense articles 172.3 of Decree 214/1990, and 5 of Royal Decree 61/1986, expressly provide that the amounts received by each official are public knowledge for the rest of the corporation's officials, in addition to union representatives.

The legislator makes the interest in obtaining said information prevail over the right to privacy of the affected workers, and therefore, the expectations of privacy that the workers may have are limited. These people must have the possibility that the rest of their colleagues know the amounts they may have received for this concept.

For all this, data protection regulations would not oppose the worker's access to information on the monthly amounts received by each of the workers as a productivity supplement.

Note, however, that although the worker requests a nominal relationship with the different monthly amounts assigned, in the particular case of local police personnel, it is necessary to take into account the sectoral regulations applicable to the security forces, which provides that they identify themselves with a professional identity card (TIP) in place of their first and last names, for security reasons. Law 4/2003, of April 7, on the organization of the public security system of Catalonia, provided in article 25 after local police forces must carry a professional accreditation document. " (...) "This document must include, at least, the municipality of affiliation, the identification of the professional category and the individual registration number. (...)

Considering that the identification of the local police is done through the TIP number, the information should be provided using this identification code instead of the first and last name. This measure, less intrusive in the privacy of the people affected, would be more appropriate to the principle of data minimization. It is obvious that the TIP identifies, or makes the holder identifiable, especially in this case where a colleague from the same unit or department accesses the information, but to the extent that this is the identification mechanism provided for by the regulations for security reasons, it should also be in this case the form of identification chosen to provide the information.

VI

In the case of gratuities, on the other hand, there is no specific legal provision for advertising (neither article 103 of Legislative Decree 1/1997, nor the rest of the regulations contemplate this possibility).

Gratuities must obey to extraordinary services provided outside the working day, and cannot be fixed in their amount or periodic in their accreditation, and even though the specific reasons for which the employee is interested are not specified access, it cannot be overlooked that access to the individualized information of the amounts allocated for this concept to each of the members of the unit may be relevant for the worker who requests it.

This person could have been financially harmed in the distribution of the allocations. The principles of transparency, objectivity, impartiality and non-discrimination that

should govern the allocation of gratuities, which ultimately depend on more discretionary decisions, would justify access by him to the information on the amounts received in an individualized way.

But this could be done, in principle, without needing to sacrifice the privacy of the affected workers. Thus, an individualized relationship could be facilitated, without including the identity of the working people. This would allow the worker to check that the amounts received are not fixed or periodic, and to detect any discriminatory situations that may have occurred by assigning these extraordinary services to some workers to the detriment of others.

The principle of minimization requires that the data be adequate, relevant and limited to what is necessary for the purpose for which they are processed (Article 5.1 b) of the RGPD).

In application of this principle, and for the purposes of achieving the purpose of transparency in this case, one should opt for pseudonymization, that is, replacing the first and last name or the TIP number, with a code assigned to each of them that does not allow identification by third parties, in such a way that it allows to see and control the monthly amounts received by the different workers of the unit in terms of gratuities, grouped by professional categories, and indicating, where appropriate, the reason specific that just

Pseudonymization involves "the treatment of personal data in such a way that they can no longer be attributed to an interested party without using additional information, as long as said additional information appears separately and is subject to technical and organizational measures aimed at ensuring that personal data are not attribute to an identified or identifiable natural person;" (article 4.5 RGPD).

In order for these codes to be effective from a data protection perspective, 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 to anyone else. In this sense, using the DNI number or another code that can be known by third parties would not be a good option.

On the other hand, and in order to avoid re-identification, the grouping of workers in the different categories can only be carried out if they are jobs that have a sufficiently large number of workers, in such a way that identifying each worker requires disproportionate deadlines or activities. This is an element that should be kept in mind in a case like the one proposed, in which, due to the size of the local police force in a small town hall, it is possible that it is not possible to provide information by grouping the workers in the different body categories.

conclusion

The data protection regulations would not prevent access to the amounts received monthly for the concepts of productivity supplement and gratuities of the local police chief during the indicated period.

Nor would it prevent access by one of the workers to the list of the other members of the Local Police, who must be identified by means of the identification number (TIP), where the amounts received as a complement to productivity

On the other hand, access to the list of amounts received as gratuities should be facilitated by means of a code that does not allow them to be identified.

Barcelona, December 12, 2019

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