

IAI 2/2019

Claim: 433/2018

Legal report issued at the request of the Commission for the Guarantee of the Right of Access to Information Public in relation to a claim presented by a councilwoman for the denial of access to information on the Municipal Register of Inhabitants

The Commission for Guaranteeing the Right of Access to Public Information (GAIP) asks the Catalan Data Protection Authority (APDCAT) to issue a report on claim 433/2018 presented by a councilor from the municipal group (...) against the City Council (...), for denying access to information on the additions and deletions produced in the Municipal Register of Inhabitants during the last 12 months.

Having analyzed the request, which is accompanied by a copy of the administrative file processed before the GAIP, and in accordance with the report of the Legal Counsel, I issue the following report:

Background

- 1. On November 12, 2018, the person making the claim, who is a councilor of the municipal group (...) in the City Council (...), presented an instance to the council in which he requested to know "the discharges and registrations in the municipal register (...) that have occurred in the last 12 months".**
- 2. On November 27, 2018, the councilor filed a complaint with the GAIP against the City Council (...), for refusing the requested information.**
- 3. As part of the complaint procedure, the Mayor of the City Council (...) issues, on January 3, 2019, a report in which he states that the City Council's position regarding the treatment of data from the municipal Register is that its confidential nature must prevail, so the public information on the movement of additions and deletions from the Register is processed solely in a statistical way.**

Having said that, he affirms that at the next municipal meeting he will give the councilor a copy of the document that the Electoral Census Office provides to the City Council every month and which, he maintains, provides this information.

A copy of the aforementioned document is attached to the report.

- 4. On January 18, 2019, the GAIP requests this Authority to issue the report provided for in article 42.8 of Law 19/2014, of December 29, on transparency, access to public information and good government, in relation to the claim presented.**

Legal Foundations

I

In accordance with article 1 of Law 32/2010, of October 1, of the Catalan Data Protection Authority, the APDCAT is the independent body whose purpose is to guarantee, in the field of the competences of the Generalitat, the rights to the protection of personal data and access to the information linked to it.

Article 42.8 of Law 19/2014, of December 29, on transparency, access to public information and good governance, which regulates the claim against resolutions on access to public information, establishes that if the refusal has been based on the protection of personal data, the Commission must request a report from the Catalan Data Protection Authority, which must be issued within fifteen days.

For this reason, this report is issued exclusively with regard to the assessment of the incidence that the requested access may have with respect to the personal information of the persons affected.

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), applicable from May 25, 2018 (article 99), defines personal data as "all information about an identified or identifiable natural person ("the interested party"); Any person whose identity can be determined, directly or indirectly, in particular by means of an identifier, such as a number, an identification number, location data, an online identifier or one or more elements of identity, shall be considered an identifiable physical person physical, physiological, genetic, psychological, economic, cultural or social of said person" (article 4.1) RGPD).

Therefore, any other limit or aspect that does not affect the personal data included in the requested information is outside the scope of this report.

The deadline for issuing this report may lead to an extension of the deadline to resolve the claim, if so agreed by the GAIP and all parties are notified before the deadline to resolve ends.

Consequently, this report is issued based on the aforementioned provisions of Law 32/2010, of October 1, of the Catalan Data Protection Authority and Law 19/2014, of December 29, of transparency, access to public information and good governance.

In accordance with article 17.2 of Law 32/2010, this report will be published on the Authority's website once the interested parties have been notified, with the prior anonymization of personal data.

II

Article 4.2) of the RGPD considers "treatment": any operation or set of operations carried out on personal data or sets of personal data, either by automated procedures or not, such as collection, registration, organization, structuring, conservation, adaptation or modification, extraction, consultation, use, communication by transmission, diffusion or any other form of enabling access, comparison or interconnection, limitation, deletion or destruction."

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

For its part, article 86 of the 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, organism or entity in accordance with the Law of the Union or 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, on transparency, access to public information and good governance (hereafter, LTC), aims to regulate and guarantee the transparency of public activity.

The first additional provision, section two, of this Law 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, the person making the claim has the status of a councilor and the information he requests is part of the Municipal Register of Inhabitants, which means that the provisions established by the local regime legislation are applicable, fundamentally, Law 7/1985, of April 2, regulating the bases of the local regime (LRBRL) and Legislative Decree 2/2003, of April 28, which approves the consolidated text of the Law municipal and local regime of Catalonia (TRLMRLC), regarding both councillors' access to municipal information and the

This without prejudice to the fact that the complaining councilor must be granted at least the same guarantees regarding access to information - including the possibility of lodging a complaint with the GAIP - as other citizens who do not have this condition of elected office, given the supplementary application of the LTC (DA1a. section 2).

III

As this Authority has done on previous occasions (among others, reports IAI 34/2017, IAI 45/2017, IAI 23/2018 or IAI 24/2018, which can be consulted on the website <http://apdcat.gencat.cat>), local regime legislation (article 77 LRBRL and article 164.1 TRLMRLC) recognizes a right of access to all elected officials, regardless of whether they are in the government team or in the opposition, to information that their local corporation has and that may be necessary for the exercise of the functions that correspond to them.

Thus, article 77.1 of the LRBRL establishes that "all members of local corporations have the right to obtain from the Mayor or President or the Government Commission any background, data or information held by the services of the Corporation and are necessary for the development of their function".

In the same sense, the TRLMRLC pronounces itself, by providing, in its article 164.1, that "all members of local corporations have the right to obtain (...) all the background, data or information that are in the possession of the services of the corporation and are necessary for the development of its function."

The right to obtain all the antecedents, data or information that are in the possession of the services of the local corporation and necessary for the exercise of their functions, in accordance with repeated jurisprudence on this issue (SSTS September 27, 2002 , June 15, 2009, among others), is part of the fundamental right to political participation enshrined in article 23.1 of the Spanish Constitution, according to which "citizens have the right to participate in public affairs, directly or through representatives, freely elected in periodic elections by universal suffrage."

It should be borne in mind that the elected officials participate in a public action that manifests itself in a wide range of specific matters, such as the right to audit the actions of the corporation, the control, analysis, study and information of the necessary antecedents , which have the services of the City Council, for their control task and to document themselves for the purposes of adopting decisions in the future (among others, STS of March 29, 2006).

However, this does not mean that this right of councilors is an absolute right. If it conflicts with other rights, it will be necessary to weigh the different rights at stake, in order to decide which should prevail and to what extent.

This has come to be recognized by the local regime legislation itself. The aforementioned article 164 of the TRLMRLC, in regulating the conditions for the exercise of the right of access to municipal information by the members of the corporations (sections 2 and 3), establishes, as a possible basis for denying the request with reasons 'information, that "the knowledge or dissemination of the information could violate the constitutional right to honor, personal or family privacy or one's image" (section 3, letter a)), but obviously access could also be denied -se when other fundamental rights may be affected such as the right to the protection of personal data (Artic

Given that the exercise of the councilor's right of access could lead to a limitation of the fundamental right to the protection of personal data, it will be necessary to determine whether it is a proportional limitation, given that, according to repeated doctrine of the Constitutional Court, the limitation of fundamental rights can only occur proportionately (SSTC 11/1981, 57/1994, 66/1995, 11/2006, 206/2007, among others).

It is therefore necessary to examine the circumstances and terms of the request that the councilor has submitted to the City Council, the intended purpose, the possible affected persons and, especially, whether there is personal data and whether this information is necessary to achieve said purpose or requires special protection.

IV

In her request, the councilor asks for information about the municipal register of inhabitants, specifically "the deletions and additions to the municipal register (...) that have occurred in the last 12 months

Article 16.1 of the LRBRL defines the Municipal Register in the following terms:

"1. The municipal register is the administrative register containing the residents of a municipality. Your data constitutes proof of residence in the municipality and of habitual residence in the same. The certifications that are issued of said data will have the character of a public and binding document for all administrative purposes. (...)".

The LRBRL (and, in the same sense, the TRLMRLC) establishes the obligation of all residents to register in the Register of the municipality where they have established their residence with a triple purpose: to determine the population of a municipality, to be required for acquire the status of resident and serve to prove residence and usual address (articles 15 and 16 LRBRL).

Point out that these purposes are clearly included in Sentence 17/2013, of January 31, of the Constitutional Court, where the Municipal Register is defined as:

"The administrative register containing the residents of a municipality, a register managed by the local councils through computerized means (art. 17.1 LRBRL) in which the persons residing in a municipality must be registered with a triple purpose, according to the arts. 15 and 16 LRBRL, determine the population of the municipality, acquire the status of neighbor and accredit residence and usual address. In addition to these functions, the electoral regime legislation provides for the preparation of the electoral census based on the data contained in the Register, which also serves to prepare official statistics subject to statistical secrecy. So, from the regulation of the LRBRL itself we can conclude that the register contains an organized set of personal data referring to identified physical persons, the residents of a municipality, being therefore a personal data file to which the regulations provided for in the LOPD."

Regarding access to the data contained in the Register, article 16.3 of the LRBRL provides that:

"3. The Municipal Register data will be transferred to other public administrations that request it without prior consent of the affected person only when they are necessary for the exercise of their respective powers, and exclusively for matters in which the residence or the domicile are relevant data. They can also be used to prepare official statistics subject to statistical secrecy, in the terms provided for in Law 12/1989, of May 9, of the Public Statistics Function and in the statistics laws of the autonomous communities with competence in the matter."

For its part, article 40 of the TRLMRLC provides:

" 40.2 The data contained in the municipal register are confidential. Access to this data is governed by the rules governing citizens' administrative access to archives and public records and by Law 5/2002, of April 19, of the Catalan Data Protection Agency.

40.3 Without prejudice to the provisions of section 2 and without requiring the consent of the person concerned, the data of the register may be communicated to other public administrations that request it, when they are necessary to exercise the respective powers, and exclusively for the matters in which it is relevant to know the residence or address."

Based on these forecasts, this Authority has been considering (among others, CNS 9/2013, CNS 67/2015, CNS 46/2016, CNS 12/2017 or CNS 39/2018) which, given that the local legislation itself allows the communication of data from the Municipal Register to other public administrations that request them when necessary for the exercise of their powers and exclusively for matters in which residence or domicile are relevant data - possibility also endorsed by the Constitutional Court (STC 17/2013, of January 31, cited)-, with greater reason it can be admitted that the different units or administrative bodies of the same

council can access this data when it is necessary for the exercise of its functions and when the given residence or address is relevant.

Specifically, we have referred to the exercise of the powers that the local regime legislation attributes to the town councils, mainly following the provisions of articles 25 and 26 of the LRBRL (and, in similar terms, articles 66 and 67 of the TRLMRLC), considering that the data of the Register would be processed for purposes that are compatible with that of the Register (article 5.1.b) RGP

In line with this criterion, therefore, it can also be admitted that the councillors, as an integral part of the town council (Article 19.1 LRBRL), must be able to access the data of the Municipal Register whenever access to this data is necessary to carry out the functions of control and supervision of the performance of the governing bodies that the LRBRL expressly attributes to them (article 22.2.a)).

Access that, in accordance with the principle of data minimization (article 5.1.c) RGPD), will have to refer only to the personal data that are necessary to give a satisfactory response to the legitimate right exercised by the councillors.

At this point, it should be remembered that the local regime legislation does not require elected officials that, in order to access the information held by the corporation, they must explain or justify the purpose of their request, given that the reason for their request must be understood as implicit in the exercise of said control and inspection functions.

However, it must be taken into consideration that, in the present case, the councilor states in her request that "on date (...) a series of terminations of office in the municipal register" and that "we have learned through the affected citizens that these terminations are inappropriate".

From these manifestations, it can be understood that the request for information on the additions and deletions from the Register that occurred in the last 12 months made by the councilor would be related in this case to the control of the own management of the Register, with the objective, apparently, to verify that there is no irregularity or fraud in the management of this register by the City itself, which is responsible for its formation, maintenance, review and custody (article 17.1 LRBRL).

In this context, it seems clear that, in order to carry out this control over municipal action, the councilor should be able to access certain information about the variations that have occurred in the municipal Register.

It is in the file that the City Council, in response to the councilwoman's request for access, intends to give her at the next municipal meeting a copy of the document from the Electoral Census Office in which it reports, broken down by months, of the number of national voters resident in the m

Without prejudice to the convenience of its delivery, it must be noted that this document alone would not allow the councilor to detect if there have been significant movements in the Register that, in the interest of the municipality's population, could be described as abnormal (for example, an extraordinary increase in resignations or additions to the Register) and that, therefore, there could be indications of eventual irregular action by the City Council, which is understood to b

For this purpose, it would be more convenient or relevant to facilitate a detailed list of additions and deletions from the Register that occurred in the specified period in which, for each addition and deletion, the date on which it occurred and the reason to which it responds.

Now, handing over this type of anonymized information (consideration 26 RGD) would be appropriate if this would allow the purpose of control intended by the councilor to be achieved but, in the present case, given the terms of her request, it cannot be ruled out that it is relevant and necessary to also be able to have the identification data of the persons registered or deregistered from the Register, as could be the case of wanting to check or verify the membership of having deregistered or deregistered certain persons, that is to say, that these highs and lows correspond to reality and not to other arbitrary criteria.

For all that, and with the information available, it must be concluded that in the present case the councilor's right of access to the information requested on the Municipal Register relating to the last 12 months must prevail.

This is without prejudice to the fact that, at the time of handing it over, it is convenient to remind the councilor of the duty of confidentiality regarding this information imposed by both the local regime legislation (article 164.6 TRLMRLC) and the RGD (article 5.1.f)), so that the processing it does must always be linked to the exercise of its functions of control and supervision of the municipal action.

conclusion

The right to data protection does not prevent the councilor from accessing information on the additions and deletions from the Municipal Register of Inhabitants that have occurred in the last 12 months, including the identification data of those potentially affected, in the case of information necessary for the correct exercise of its functions of control and supervision of the management of the Register carried out by the City Council.

Barcelona, January 29, 2019