

Ref.: IAI 3/2019

## **Claim: 387/2018**

**Legal report issued at the request of the Commission for the Guarantee of the Right of Access to Information Public in relation to the supplementary report issued by Torredembarra City Council regarding claim 387/2018**

The Commission for the Guarantee of the Right of Access to Public Information (GAIP) asks the Catalan Data Protection Authority (APDCAT) that, in view of a supplementary report issued by a city council in relation to claim 387/ 2018, regarding which the report IAI 53/2018 was issued, issue a new report or an extension of the previous one.

Having analyzed the request, which is accompanied by a copy of the report issued by a town council and sent to the GAIP, and in accordance with the report of the Legal Counsel I issue the following report:

### **Background**

- 1. On August 3, 2018, a citizen wrote to the city council in which he asked questions about whether there had been an increase in the remuneration of the Municipal Comptroller, the employment relationship of the Comptroller with the town hall, if other municipal workers had also experienced an economic increase in their remuneration, and on the incorporation of a new manager.**
- 2. On October 19, 2018, the requested city council responded to the applicant indicating the working relationship of the Municipal Comptroller with the city council and information on the incorporation of a new manager. With regard to the information relating to the salary increases, both of the Municipal Comptroller and of the rest of the staff, this information is denied basing the denial on the existence of personal data.**
- 3. On October 23, 2018, the same citizen presented a claim to the GAIP against the requested city council, in which he requested that he be provided with "data on public workers' salaries to be able to write a news story".**
- 4. On October 30, 2018, the GAIP transfers the claim to the town hall and requests the completed file and report on it.**
- 5. On December 4, 2018, 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 (hereafter LTC), in relation to the claim submitted.**
- 6. On December 21, 2018, this Authority issued the IAI 53/2018 report, which was sent to the GAIP.**

7. As a result of the transmission by the GAIP to the required city council of the report issued by this Authority, the city council issues a report, which it calls complementary, in which it introduces issues not raised in the request access made by the claimant, and therefore issues on which this Authority did not rule because they were not the subject of the access request.

This report was sent on January 11, 2019 to the GAIP.

8. On January 18, 2019, the GAIP, considering that the supplementary report carried out by the city council provides new information that affects the subject of the IAI 53/2018 report, forwarded it to this Authority and only request that a new report or an extension of the previous one be issued.

#### 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 issue a report to 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 under the terms of Regulation (EU) 2016/679 of the European Parliament and of the Council, of April 27, 2016, regarding the protection of natural persons with regard to the processing of personal data (hereafter, RGPD). Therefore, any other limit or aspect that does not affect the personal data contained in the requested information is outside the scope of this report, as would be the case of the limit established in article 21.1.b) of the LTC, relating to the investigation or sanction of criminal, administrative or disciplinary violations, the application of which could lead to the claimant's right of access being denied or restricted for the purposes of protecting the investigation

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

According to the information sent by the GAIP, the claimant made a request for access to a town hall in which he asked a series of questions about whether there had been an increase in the salary of the Comptroller and the other municipal workers, the employment situation of the comptroller and the incorporation of a new manager with the aim of writing a news item in a local press. And, as a result of considering the answer given by the City Council unsatisfactory, the same person submits a claim to the GAIP in which he requests access to data on the salaries of public employees of the City Council, without making a distinction between the type of worker nor his category within the organization.

Regarding this claim, the IAI report 53/2018 was issued, which can be consulted on the APDCAT website [www.apdcat.cat](http://www.apdcat.cat), where the request presented to the City Council was analyzed and in which concluded that:

"(...)

However, in the case we are dealing with, the remuneration of the place of intervention of the City Council is not requested, but the increase in remuneration that may have been experienced by this and other places in the City Council. The request made by the person making the claim to the City Council asked to know if the municipal comptroller had seen her economic remuneration increased and if there were other municipal workers who had also had an increase in their remuneration. (...)

In short, any variation in the remuneration conditions of public employees must be subject to publication through the instrument of modification, either the State Budget Law (with regard to basic remuneration and the limit of increase in global remunerations), the approval provisions of the municipal budgets, the resolutions of the Plenary of the Corporation or the corresponding modification of the RLT.

In this sense, from the perspective of data protection regulations, it could be understood that given that this is information that is the subject of active advertising, it is possible to exercise the right of access to that information relating to the salary increases that must be included in the list of jobs (RLT) of the council, as well as those others that could be inferred from the budget laws if the provisions relating to the remuneration contemplated therein are related to the content of the 'RLT. This information would be associated with each position or workplace and not with a specific person.

It is also worth noting that providing information about a salary increase does not necessarily involve making third parties aware of data that would allow them to perform an economic profile of the person.

**In short, it is considered that the data protection regulations would not prevent responding to the person claiming to inform them about the salary increases of the municipal comptroller, or, in the event that they existed, of other positions or jobs in the council."**

**In the complementary report carried out by the City Council, it is specified that, in their case, there has been no increase in remuneration due to any modification of the relationship of jobs and that the only remuneration increases that they received all City Council jobs are those marked by Law 26/2018, on General State Budgets which, in its opinion, is public data. Instead, what has occurred are allocations of productivity supplements and gratifications, remunerations that are assigned to the person and not to the workplace, which, in his opinion, is information that cannot be provided, and that this criterion can modify the meaning of the report issued by this Authority.**

**Certainly, this was not analyzed in the report issued by this Authority, because it was outside the request made by the person making the claim before the City Council. It must be taken into account that, by means of the claim against the express or presumed resolutions in the matter of access to public information, regulated in chapter IV of the LTC, the information on which it has been carried out cannot be expanded the request for access, although this may be the subject**

**However, this Authority can be consulted on those questions relating to the application of the limit relating to the protection of personal data in relation to access to public information, as in the case in question where the GAIP requests a specific statement regarding the considerations made by the City Council in relation to productivity supplements and extraordinary gratuities.**

### **III**

**Regulation (EU) 2016/679 of the European Parliament and of the Council, of 27 April, relating to the protection of natural persons with regard to the processing of personal data (hereinafter, RGPD), defines personal data as "any 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;**

**The data available to the City Council, which identify and refer directly to workers, as well as other data that may refer more specifically to the workplace they occupy, but which are associated or linked to a specific worker, and that therefore identify you, are personal data and are protected by the principles and guarantees established by the RGPD and by Organic Law 3/2018, of December 5, on the Protection of Personal Data and guarantee of digital rights (LOPDGDD ).**

**The communication of personal data is data processing in accordance with the RGPD which defines it as "any operation or set of operations carried out on personal data or sets of personal data, whether by automated procedures or not, such as the collection , the registration, organization, structuring, conservation, adaptation or modification, extraction,\_\_\_**

consultation, use, communication by transmission, dissemination or any other form of enabling access, access 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".

Article 6.3 of the RGPD establishes that the basis of the treatment indicated in Article 6.1 c) must be established by the Law of the European Union or by the law of the Member States that applies to the person responsible for the treatment. In this regard, article 8.1 of the LOPDGDD establishes:

"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 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."

Law 19/2014, of December 29, on transparency, access to public information and good governance (LTC hereinafter) aims to regulate and guarantee the transparency of public activity.

Specifically, article 18 of the LTC 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 legally 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". Therefore, the information requested is "public information" subject to the access regime provided for in the transparency legislation.

The information relating to the remuneration of City Council workers is public information for the purposes of article 2.b) LTC and, therefore, remains subject to the access regime provided for in the transparency legislation.

#### IV

With regard to the remunerative concepts of productivity and gratuities, articles 54 and 55 of Decree 214/1990 of July 30, which approves the Regulation of personnel in the service of local entities, establish the competence for their determination to the General Assembly of the corporation and the mayor for their individual assignment. Also, article 172 declares that the productivity supplement will be public both for the other officials of the corporation and for the union representatives:

**"Article**

**54 -1 It is up to the plenary session of the corporation and, where appropriate, to the maximum corporate body of the local entity: (...) b) Determine in the budget the global amount destined for the allocation of productivity supplement and gratifications. (...)**

**Article 55**

**Corresponds to the mayor and, if applicable, to the president of the local entity, without prejudice to the delegations legally provided for: (...) t) Carry out the individual allocation of the productivity supplement and gratuities , in accordance with the state rules governing the remuneration of staff in the service of local entities. (...)"**

**Article 172**

**1. The assessment of productivity must be carried out based on objective circumstances directly related to the performance of the job and the objectives assigned to it.**

**2. In no case will the amounts allocated for productivity supplement during a period of time give rise to any type of individual right regarding valuations or appreciations corresponding to successive periods.**

**3. The amounts that each official receives for this concept will be public knowledge, both of the other officials of the corporation and of the union representatives.**

**4. It is up to the plenary session of each corporation to determine in the budget the overall amount allocated to the allocation of productivity supplements to civil servants within the maximum limits indicated in article 175.2.b) of this Regulation.**

**5. The mayor or president of the corporation is responsible for the distribution of this amount between the different programs or areas and the individual allocation of the productivity supplement, subject to the criteria that, if applicable, the plenary has established, without prejudice to the delegations that may be conferred in accordance with Law 8/1987, of April 15, municipal and local regime of Catalonia.**

**In this way, and generally in accordance with the obligation to publish the minutes of the plenary session, which, as explained, establishes article 10.2 of Law 29/2010, of August 3, of 'use of electronic media in the public sector of Catalonia, the information relating to the global amount allocated to productivity and gratifications, which must be agreed by the full body of the corporation, will be the subject of active advertising. In this case it is information about the overall amount that is budgeted for this concept and will not contain personal data.**

The individual allocation of these remuneration supplements corresponds to the mayor, and, with regard to the amounts received by any municipal official in terms of productivity, it would be subject to publicity restricted to the rest of the corporation's officials as well as of union representatives, as established in article 172.3 of Decree 214/1990.

In addition, as regards the senior positions of the Public Administration, this information would be subject to active publicity. As set out in ground IV of the IAI 53/2018 report, according to article 11.1.b) of the LTC, the remuneration received by senior officials of the Public Administration must be published on the transparency portal, individually for each job and for any remuneration, compensation or allowance. Therefore, the remuneration of high-ranking officials, including extraordinary remuneration, must be the subject of active advertising and, in this case, the information on remuneration must be published, on an annual basis and in full terms without including deductions and without breakdown of remuneration components.

As for the rest of the workers, article 11.1.e) of the LTC obliges only to publish "information general on the remunerations, compensations and per diems received by public employees, grouped according to the levels and bodies".

The transparency obligations provided for in article 11.1.b) of the LTC, can be extended with respect to requests for access to information that affects both management staff and staff who occupy positions of special trust, of special responsibility within the organization or of a high level in the entity's hierarchy, of free appointment, or that involve a high level of remuneration.

Although the law does not expressly provide for the publication on the transparency portal of the remuneration of this type of public employee, in the weighting of the rights that must be done with respect to requests for access to information, that is in what we could call a test of the public interest that must determine whether access to information contributes to a better knowledge of the criteria of organization and operation and of how public resources are allocated, with respect to those places of work that due to its uniqueness within the organization, and also due to the remuneration level that is usually associated with it, the knowledge of its remuneration can be relevant for the control of the use of public resources, and therefore the result would be the prevalence of the public interest in its disclosure.

This criterion would be extended to the knowledge of all remunerations including, both the amounts received and gratuities for extraordinary services, regarding which and as this Authority has previously expressed, "the control of the use that the administration can make of this retributive element is relevant for the purpose of transparency, since it allows to evaluate and form a critical opinion of the management of human resources carried out to terms by a city council", as with regard to the amounts perceived as a productivity supplement, in which the award is based on aspects of discretion, an issue that reinforces the need for transparency, and with regard to which restricted publicity is already planned.

In accordance with the above, for this type of public employee in a managerial and trusting field, in the cases of requests for access to information about their remuneration, it would be justified to provide individualized information, for any retributive concept and, even identifying the affected people, giving them the deadline provided for in article 31 of the LTC so that they can make allegations.

In the case at hand, the information requested is related to the municipal auditor. The intervention functions of the Local Corporations are reserved for Administration officials Local with national qualification, whose legal regime is regulated by Royal Decree 128/2018, of March 16, according to which the provision of jobs reserved for this type of civil servant will be carried out, with general by competition and, exceptionally, (in the cases of large population municipalities, provincial councils, metropolitan areas, cabildos and island councils, and the cities of Ceuta and Melilla) can be covered by the system of free appointment.

Also, with regard to municipalities with a large population, according to the provisions of article 130 of the LRBRL, the secretary of the corporation and the municipal comptroller general, among others, are holders of superior and managerial bodies. Whereas, with regard to the rest of the municipalities, each municipality must determine, in accordance with its organizational regulations, its own management staff, if it has any (art. 306 of the TRLMRLC). Consequently, outside the municipalities with a large population, local government officials with national qualification will be holders of management bodies (therefore, high office), if the local body expressly recogn

In any case, even outside the cases of free appointment or that the organizational regulations have not expressly recognized them as holders of management bodies, the importance of the functions entrusted to the municipal auditors and their significance in the 'organization, criteria that must be assessed in order to consider this job as one of special responsibility, and in this sense comparable also for the purposes of transparency to the high positions of the Public Administration.

In this sense, the statement of reasons for Royal Decree 128/2018, mentioned, sets out:

"(...)

Also, strengthen and clarify the functions reserved for local government officials with national qualification, because it is understood that they are basic for the operation of local corporations, especially the supervisory function, to achieve a more rigorous economic and budgetary control, in the framework for the deployment of article 213 of the recast text of the Law regulating local finances, approved by Royal Legislative Decree 2/2004, of March 5, which should contribute to improving decision-making by elected officials in the exercise of the representative mandate entrusted to them constitutionally.

Guarantee more professionalism and efficiency in the exercise of reserved functions.

To allow a more effective and homogeneous management of this group throughout the national territory, given the importance of the functions they perform in local corporations, and their impact on the general interest. (...)"

In short, it is considered that the data protection regulations would not prevent, prior to the hearing procedure provided for in article 31 of the LTC, the person making the claim being given access to the information on the remuneration received in terms of productivity and extraordinary gratifications by the municipal comptroller, or, of other places or workplaces in the council in which the character of trust or special responsibility may arise.

## **Conclusions**

**The right to data protection does not prevent the person making the claim from providing information on the allocation of productivity supplements and gratuities to the municipal comptroller, or to other positions or workplaces in the council in which the character of trust or special responsibility.**

**Barcelona, February 14, 2018**

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