

Ref.: IAI 14/2019

Claim: 146/2019

Legal report issued at the request of the Commission for the Guarantee of the Right of Access to Information
Public notice on the claim presented against the refusal of a city council to access the request for data relating to the licenses for terraces of restaurant premises in force on 31 December 2018.

The Commission for the Guarantee of the Right of Access to Public Information (GAIP) asks the Catalan Data Protection Authority (APDCAT) to issue a report on claim 146/2019, submitted in relation to the denial of access to the request for data relating to the licenses for terraces of restaurant premises, in force on 31 December 2018.

Having analyzed the request, which is accompanied by a copy of the claim submitted, and in accordance with the report of the Legal Adviser, I issue the following report:

Background

1. On January 3, 2019, a citizen submitted a request to a city council to access certain public information relating to terrace licenses granted and valid on December 31, 2018.

Specifically, in the submitted application it is stated that access refers exclusively to the following information:

"...the information contained in the terrace certificate that the City Council, in accordance with article 40 of the Terraces Ordinance, provides to the holder of the terrace licence. The card in question includes the following information: a. The name of the licensee. b. The address of the restaurant on which the terrace depends. c. The number of authorized basic modules (article 6.1 of the Ordinance). d. The number of authorized reduced modules (art.6.2). e. The capacity of the terrace (number of authorized chairs)."

2. On February 5, 2019, the city council issued a resolution partially denying access to the requested information. In particular, access to the information relating to the name of the license holders is denied, noting that this information is considered personal data subject to the RGPD and that the holders have not given their consent for the communication of the data to a third

3. On March 14, 2019, the applicant filed a complaint with the GAIP against the city council for the failure to provide the requested information. According to the claim form, the information must be provided to them given that:

"- these data appear in the terrace certificate, which the Terraces Ordinance requires to be displayed publicly on the premises. - in many cases, license holders are legal entities (including self-employed persons), excluded from the scope of the Regulation which is limited to natural persons. - this information is of public interest and is not protected. - the administration provides such data in public documents and acts."

4. On March 19, 2019, the GAIP transfers the claim to the town hall and requests the completed file and report on it.

5. On March 21, 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 (hereafter LTC), in relation to the claim submitted.

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.

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 of the Law 19/2014, of December 29, on transparency, access to public information and good governance.

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

The object of the complaint presented is the partial denial of a city council's request for access to information consisting of the list of restaurant terrace licenses in force on December 31, 2018. Specifically, of in accordance with the resolution contained in the file, the City Council denies access in terms of including the name of the license holder in the lists and bases this denial on the fact that it does not have the consent of the interested parties for the communication of your personal data to a third party.

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 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;".

In accordance with the definition of treatment in article 4.2 of the RGPD "consultation, use, communication by transmission, dissemination or any other form of enabling access, access or interconnection, limitation, deletion or destruction" of personal data, are data treatments subject to the principles and guarantees of the RGPD. Therefore, the communication of personal data by the City Council, as a result of the request made by the person now claiming, is data processing under the terms of the RGPD.

The RGPD provides that all processing of personal data must be lawful, loyal and transparent in relation to the interested party (Article 5.1.a)) and, in this sense, establishes a system of legitimizing the processing of data which is based on the need for one of the legal bases established in its article 6.1 to apply. Specifically, sections c) and e) of article 6.1 of the RGPD provide respectively, 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", or if "it 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 the treatment".

As can be seen from article 6.3 of the RGPD and expressly included in article 8 Organic Law 3/2018, of December 5, on the protection of personal data and guarantee of digital rights

(LOPDGDD), data processing can only be considered based on these legal bases of article 6.1.c) and 6.1.e) of the RGPD when this is established by a rule with the rank of law.

At the same time, article 86 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, body or entity of 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."

In view of this, Law 19/2014, of December 29, on transparency, access to public information and good governance (LTC hereafter) aims, among others, to "regulate and guarantee the right of access of people to public information and documentation" (art. 1.1.b).

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".

In short, the information available to the city council regarding the processing and granting of licenses for the installation of a terrace in the open space for public use to which the claim refers is "public information" for the purposes of the LTC and would remain subject to the access regime provided for in this regulation. Consequently, from the point of view of the right to the protection of personal data, the communication of this information containing personal data can be considered a lawful treatment covered by letter c) of article 6.1 of the RGPD, as long as it complies with the transparency legislation and the rest of the principles and guarantees of the RGPD.

III

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, in application of the regime provided for in articles 23 and 24 of the LTC, whether or not the right to data protection of the affected persons would justify the limitation of the right of access to the information subject to the re

In the case at hand and with regard to the sectoral regulations governing the procedure that has given rise to the information subject to the consultation, the city council within the framework of the Municipal Ordinance on activities and integral intervention of the 'environmental administration (OMAlIA) approved by Plenary Council Agreement of March 30, 2001, has regulated through the Terraces Ordinance, of December 20, 2013, the legal regime applicable to the installation and operation of terraces of catering establishments and similar in the open spaces for public use in the city of Barcelona, and administrative intervention in this area.

In accordance with this regulation, an intervention regime is established in which the City Council subjects the terrace activity of catering and similar establishments to the prior obtaining of the corresponding municipal license. In this procedure, the City Council provides the holder of the terrace license with a certificate certifying its granting and its characteristics, which the holder of the same has the obligation to place in a way that is visible from the public road (article 40 of the terrace ordinance).

According to what is established in article 5 of the ordinance, license holders can be "physical or legal persons, public or private, who have, either as owners, tenants or any other legal title, the ownership of catering or similar establishments".

To the extent that the RGPD extends its scope of protection to personal data understood as all information about an identified or identifiable natural person (Article 4.1 of the RGPD), personal data are excluded from this scope of protection legal, as specified by the RGPD itself, establishing that "The protection granted by this Regulation must apply to natural persons, regardless of their nationality or place of residence, in relation to the treatment of their personal data. This Regulation does not regulate the processing of personal data relating to legal entities and in particular to companies established as legal entities, including the number and form of the legal entity and its contact details. (Recital 14).

Consequently, the limits provided for in the transparency legislation (articles 23 and 24 of the LTC) do not apply in cases where the license holders are legal entities to the extent that the legal entities are not holders of the right to the protection of personal data.

On the contrary, in relation to access to information that contains data that allows the direct or indirect identification of natural persons, including individual entrepreneurs and liberal professionals, holders of the licenses subject to the query, the limits provided for will apply in the transparency regulations regarding access to information containing personal data.

With respect to this information and, given that it is not particularly protected data under the terms of article 23 of the LTC (access to which would require the express consent of the holder), it is necessary to apply what is provided for in article 24.2 of the LTC according to which:

"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 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. (...)."

In accordance with this regulation, a balance must be made between the public interest in the disclosure of information and the right to data protection of the persons affected, in this case the license holders.

Although in accordance with article 18.2 of the LTC, the exercise of the right of access is not subject to motivation, the fact that the applicant expresses what is the purpose he pursues and, in short, the reasons for which it is interesting to know the information, adds a very important element to be taken into account to determine whether access can be granted, since the purpose, in accordance with the LTC, is one of the weighting elements between the public interest in the disclosure of information and the right of the people affected.

Generally speaking, the purpose of the transparency legislation is "to establish a system of relations between people and the public administration and the other obliged subjects, based on the knowledge of public activity, the encouragement of citizen participation, the improvement of the quality of public information and administrative management and the guarantee of the retention of accounts and responsibility in public management" (Article 1.2 LTC).

In the case we are dealing with, the person requesting access does so on behalf of a Restoration Guild, which is a non-profit association that has, among other purposes, as stated in its statutes, the representation, defense and the promotion of the professional, economic, social and cultural interests of its members (who may be natural or legal persons who carry out restoration activities within the territorial scope of the association). In his application and in the corresponding claim, the applicant does not state a specific purpose of the access, but he does state what the objectives of the association are before the public administrations and the arguments according to which he considers that the City Council must attend to his request.

The Restoration Guild in the exercise of its functions may be interested in accessing the information available to the City Council, in this specific case, in relation to the terrace licenses granted to the restaurant establishments in the city subject to the consultation, that allows it to carry out a control and monitoring of compliance with the legality of the administrative action in this area of activity, and in particular, to verify that the very specific requirements and limits imposed by this regulation are respected. With regard to access to the first and last names of the owners of the terrace licenses of the restaurant establishments, it cannot be ruled out that it may be relevant, within the framework of these functions of defending the professional and economic interests of its associates, to know to whom these licenses have been granted.

From the point of view of the affected persons, and in relation to the analysis of the possible harm that access to their identifying data could entail for their privacy, it must be taken into consideration that the regulations governing licenses already provide an advertisement of these.

Thus, article 45.1 of Law 39/2015, of October 1, on the common administrative procedure of public administrations (LPAC), determines that:

"1. The administrative acts must be published when the regulatory rules of each procedure establish it or when it is recommended by reasons of public interest appreciated by the competent body. (...)"

Within the framework of the authorization provided for in article 45.1 of the LPAC, article 29 of the OMAIIA establishes:

"1. Resolutions granting licenses must be posted on the City Council's notice board and in the telematic means of municipal information, and published in the Municipal Gazette.

2. Once the license has been granted, the owner of the activity must have it in an appropriate and visible place located within the center or establishment in which the authorized activity is exercised and exploited."

And article 40 of the Terraces Ordinance establishes:

"1. The City Council must provide the holder of the terrace license with a certificate certifying its granting and its characteristics once the fees referred to in article 39 have been paid.

2. The person holding the license has the obligation to place the certificate of the authorized terrace at the entrance of the main premises, so that it is visible from the public road and at a height between 1.00 and 1.60 meters of height

3. The City Council must deliver the certificate with the renewal of the license annually."

This publicity, and in particular the display of the license certificate (which includes the name of the owner and the address of the establishment) has, among other things, the purpose of allowing any person to identify and verify that the terrace has the corresponding authorizations and the conditions of this authorization.

To the extent that this information must be public and that it is information that does not allow obtaining a profile of the person, the communication of the data should not, in principle, entail a detriment to the privacy of the affected person that could justify a limitation of access. This, unless there is some personal circumstance that makes it advisable to limit access to said information.

It should be remembered that article 31 of the LTC establishes that if the request for public information may affect the rights or interests of third parties, identified or easily identifiable, they must be given a transfer of the request, in order that they can make the allegations they consider appropriate. This procedure is essential so that the affected people have the possibility to expose if there is any element that, depending on the personal situation of the affected person, should lead to a limitation of access.

Finally, in relation to the terms in which access to information takes place, we cannot forget the principle of data minimization provided for in art. 5.c) of the RGPD according to which the personal information provided in the exercise of the right of access must be adequate, relevant and limited to what is necessary to achieve the intended purpose. In this sense, (aside from the information relating to the address of the establishment, the number of basic or reduced modules authorized, and the capacity of the terrace) the information to be provided should be limited to the first and last name requested, avoiding providing along with the first and last name, the complete ID number or equivalent identification document number or other unnecessary identification data

Conclusions

The right to data protection does not prevent the person making the claim from providing the information on the first and last names of the holders of the terrace licenses granted by the city council in force on 31 December 2018.

Barcelona, March 28, 2019

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