Ref.: IAI 18/2019

Claim: 196/2019

Legal report issued at the request of the Commission for the Guarantee of the Right of Access to Information Public in relation to the claim for the denial of access to the e-mails of the staff of the Generalitat distinguishing between official and labor personnel and within each of these classified by departments and bodies.

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 196/2019 presented in relation to the denial of access to e-mails of the staff of the Generalitat distinguishing between official and labor staff and within each of these classified by departments and bodies.

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 February 5, 2019, a citizen, in the name and representation of a union, submitted a request for information (...) in which he requested, "the supply of the emails of the staff of the Generalitat distinguishing between official and labor personnel and, within each of these classified by Department and organizations and in any case specifically the personnel dependent on the Department of Education".

2. On March 20, 2019, (...) denies access to the requested information considering that the claimant union has not obtained presence in any representative body of the administration of the Generalitat de Catalunya and therefore it would not meet the requirements for access to this information established in article 8 of the LOLS.

3. On April 3, the applicant filed a claim with the GAIP (...).

4. On April 9, 2019, the GAIP transfers the complaint submitted to the Department (...) and requests the corresponding report as well as the completed file.

5. On April 25, 2019, the Department (...) issued a report on the claim submitted.

6. On October 9, 2018, the GAIP requests this Authority to issue a report 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 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, such as the limits established in article 21 of the LTC, 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

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

Article 18 of the LTC establishes that "people have the right to access public information, referred to in article 2.b, in an individual capacity or in the name and representation of any legally constituted legal person" (section 1). The aforementioned article 2.b) defines "public information" as "the information prepared by the Administration and that which it has in its power as

as a result of his activity or the exercise of his functions, including that supplied by the other obliged subjects in accordance with the provisions of this law".

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

However, 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, access must be denied "if the information you want to obtain contains particularly protected personal data, such as those relating to ideology, trade union membership, religion, beliefs, racial origin, health and sex life, and also those relating to the commission of criminal or administrative offenses that do not entail a public reprimand to the offender, unless the affected person consents expressly by means of a writing that must accompany the request". (art. 23 LTC).

In the event that the information to which you want to access does not contain specially protected data, to determine the extent of the limit it is necessary to balance the right to data protection of the affected persons, and the public interest in disclosure of the information, in terms of article 24 of the LTC which establishes:

> **"1. Access to public information must be given if it is information directly related to the organization, operation or public activity of the Administration that contains merely identifying personal data unless, exceptionally, in the specific case it has to prevail over the protection of personal data or other constitutionally protected rights.**
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> **2. If it is other information that contains personal data not included in article 23, access to the information can be given, with the previous reasoned weighting of the public interest in the disclosure and the rights of the people affected. To carry out this weighting, the following circumstances must be taken into account, among others:**
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> **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.**
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> **3. Requests for access to public information that refer only to the applicant's personal data must be resolved in accordance with the regulation of the right of access established by the data protection legislation staff."**

III

In the request for access presented (...) object of the claim, it is requested to access the "e-mails of the staff of the Generalitat distinguishing between official and labor staff and, within

each of these classified by departments and bodies, and in any case specifically the staff dependent on the Department of Education immersed in a process of union elections in which we intend to participate".

In order to determine whether this request for information is subject to the limits regulated in articles 23 and 24 of the LTC it is necessary to analyze whether the requested information contains personal data and whether, therefore, it is applicable the regime provided for in the RGPD.

The GDPR applies to the fully automated processing of personal data, as well as to the non-automated processing of personal data contained in a file or intended to be part of it (Article 2.1).

For the purposes of the RGPD, all information about an identified or identifiable natural person (the interested party) is considered "personal data"; in accordance with the second section of article 4.1 of the RGPD "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 of the physical, physiological, genetic, psychological, economic, cultural or social identity of this person" (article 4.1 RGPD).

Recital 26 of the RGPD specifies that: "The principles of data protection apply to all information relating to an identified or identifiable natural person (...) To determine whether a person is identifiable it is necessary to take into account all the means that can reasonably be used by the controller or any other person to directly or indirectly identify the natural person, such as singulation. In determining whether there is a reasonable likelihood that means will be used to identify a natural person, all objective factors, such as the costs and time required for identification, must be considered, taking into account both the technology available at the time of the treatment as technological advances."

As this Authority has previously highlighted, information relating to e-mail addresses must be considered to be personal data. In this regard, the CNS opinion 4/2011, which can be consulted on the website www.apdcat.cat, concludes:

> "It should be borne in mind that an email address will always appear necessarily linked to a specific domain, in such a way that it is possible to proceed with the identification of its owner by consulting the server on which this domain is managed, without this requiring a disproportionate effort on the part of whoever proceeds with the identification. On the other hand, the e-mail addresses of employees of a company (public, in this case) are usually configured in such a way (name_lastname@domainname) that they easily allow to identify their holders.
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> Therefore, according to these definitions, there can be no doubt that the information relating to the e-mail addresses of the people working in the public company can be qualified as personal data. Therefore, its treatment will be subject to the principles and obligations of the regulations on data protection."

The RGPD defines processing of personal data 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 collection, registration, organization, structuring, conservation, adaptation or modification, extraction, consultation, use, communication by transmission, dissemination or any other form of enabling access, sharing or interconnection, limitation, deletion or destruction".

The communication of the e-mail addresses of the Generalitat workers to the complaining union (...) is a processing of personal data subject to the principles and guarantees of the RGPD.

Article 5.1.a) of the RGPD 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).

The processing of personal data not included in the special categories (those that reveal ethnic or racial origin, political opinions, religious or philosophical convictions or trade union affiliation, and the processing of genetic data, biometric data intended to identify unequivocally a natural person, data relating to health or data relating to the sexual life or sexual orientation of a natural person (art. 9.1 RGPD)) is considered lawful if it meets at least one of the conditions provided for in article 6.1 of the RGPD, including that contained in letter c) the fulfillment of a legal obligation applicable to the data controller.

The transparency legislation constitutes a legitimate basis for the treatment in accordance with article 6.1.c) of the aforementioned RGPD. In this sense, article 86 of the RGPD establishes:

> **"The personal data of official documents that are in the possession of a public authority, a public body or a private entity for the performance of a mission in the public interest may be communicated by this authority, body or entities 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."**

Also, the second additional provision of the LOPDGDD, establishes:

> **"Active advertising and access to public information that regulates title I of Law 19/2013, of December 9, on transparency, access to public information and good governance, as well as the obligations of active advertising that it establishes regional legislation, must be submitted, when the information contains personal data, to the provisions of articles 5.3 and 15 of Law 19/2013, Regulation (EU) 2016/679 and this Organic Law."**

Consequently, access to the public information that is the subject of the query can be considered a legitimate treatment, from the point of view of the data protection regulations, which must be subject to the limits provided for in the transparency legislation so regarding access to personal data, and also to what is established by the data protection regulations (RGPD and LOPDGDD).

IV

As explained, article 24.1 of the LTC establishes that "access to public information must be given if it is information directly related to the organization, operation or public activity of the Administration that contains merely identifying personal data unless, exceptionally, in the specific case the protection of personal data or other constitutionally protected rights must prevail".

The LTC uses the concept of "merely identifying personal data related to the organization, operation or public activity of the Administration", regarding which it preaches that access must be given to information requesters except that "must prevail, in the specific case, the protection of personal data or other constitutionally protected rights".

In order to determine whether article 24.1 enables the treatment that is the subject of the query, it will be necessary to analyze, first of all, whether the electronic address of public employees can be considered a merely identifying data of these, related to the organization, the operation or public activity of the Administration.

As this Authority has previously stated, there **is no doubt that the first and last names of public employees are identifying data, so in the IAI report 4/2018, which can be consulted on the website www.apdcat.cat concludes:**

> **"The name and surname of the people who hold each of the public entity's jobs are merely identifying personal data directly related to the organisation, operation or public activity of the body.**

With regard to the corporate e-mail address, as a tool provided by the organization for the development of the tasks entrusted to it as such an employee, it must be considered an identifying data related to the organization's operation or the public activity of the Administration.

However, as has also been explained, access to public information must be subject, when the information contains personal data in addition to the provisions of the transparency regulations, (in this case article 24.1) , in the RGPD and the LOPDGDD.

The LOPDGDD has incorporated specific provisions for certain data processing, including the processing of contact data, regarding which article 19 establishes:

> **"1. Unless there is evidence to the contrary, the treatment of contact data and, where appropriate, those relating to the function or the place exercised by natural persons who provide services in a legal entity provided that the following requirements are met:**
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> **a) That the treatment refers only to the data necessary for its location professional**

b) That the purpose of the treatment is solely to maintain relations of any kind with the legal person in which the affected person provides his services.

2. The same presumption operates for the treatment of data relating to individual entrepreneurs and liberal professionals, when they refer to them solely in this condition and are not treated to establish a relationship with them as natural persons.

3. Those responsible or in charge of the processing referred to in article 77.1 of this Organic Law may also process the data mentioned in the two previous sections when this derives from a legal obligation or is necessary for the exercise of their skills."

This provision is applicable, in accordance with the third section of article 19 in relation to letter c) of article 77.1 of the LOPDGDD, to "the General Administration of the State, the administrations of the autonomous communities and the entities that make up the local administration" when the treatment derives from a legal obligation or is necessary for the exercise of its powers.

Article 19 of the LOPDGDD therefore establishes a legal authorization for the processing of contact data and, where applicable, those relating to the function or position exercised by natural persons who provide services in a legal entity , as long as the requirements provided for in this article relating to the purpose of the treatment are met.

In short, in order for the "merely identifying personal data related to the organization, operation or public activity of the Administration" to be transferred (art. 24.1 LTC) the requirements established by l first paragraph of article 19 of the LOPDGDD, that is to say, with regard to the data that can be processed, that it refers only to the data necessary for your professional location and, with regard to the purpose of the treatment that this is "only to maintain relations of any kind with the legal person in which the affected person provides his services".

In the case at hand, it cannot be concluded that the transmission of trade union information by a union that does not have representation in the Administration of the Generalitat, has as its object maintaining relations with the administration of the Generalitat, as legal entity in which the public employees whose data is requested provide their services.

v

In the absence of authorization for the communication of the data subject to the claim in article 24.1 of the LTC in relation to article 19 of the LOPDGDD, in order to determine whether access to the information can be granted only requested to carry out the weighting between the interests at stake provided for in article 24.2 of the LTC.

The purpose of access and the guarantees offered is one of the weighting criteria provided for by article 24.2 of the LTC, which has particular relevance in the case at hand, in which the request carried out by a Union that, as stated in the claim form presented, wants to access this information for "a process of union elections in which we intend to participate, given the nature of our union activity and in order to inform the

staff of the Administration, in the exercise of our functions, the aforementioned relationship is essential to us".

In the IAI report 47/2018 issued by this Authority in relation to the claim for the denial of access to the e-mail addresses of the workers of the Generalitat to a union with representation in the representative bodies of the Generalitat, carry out the considerations that are transcribed:

"With regard to the email address data, as this Authority has highlighted in previous opinions (in particular, in opinions CNS 12/2015, CNS 7/2012 and CNS 4/2011, available on the web www.apdcat.cat), of the provisions of Organic Law 11/1985, of August 2, on freedom of association (LOLS), regarding the exercise of the right to freedom of association by the most representative unions (article 8) and the existing constitutional doctrine in this matter (STC 281/2005, of November 7), it follows that there is sufficient legal authorization to be able to send information of a union and labor nature to workers through the address of e-mail provided by the company - either the workers' own e-mail address or a distribution list created for that purpose - as long as the constitutionally established limits are respected.

Specifically, the CNS opinion 4/2011 highlighted:

"At this point, reference should be made, as noted in the consultation letter, to Constitutional Court Judgment number 281/2005, of November 7, which examined the use of company email by of the unions Specifically, it should be taken into account that the Court considers that:

1. The right to inform workers is part of the essential content of freedom of association and the union can make it effective through the means provided for in the law and also through other means that it freely adopts, as long as it respects normalcy productive (FJ 4).

2. There is no legal obligation to facilitate the transmission of trade union information to workers, affiliated or not, by means of an e-mail system in charge of the employer (FJ 5), but if the company already has 'this medium, although it is not designed for union use, unions can use it to transmit news of union interest to their members and to workers in general (FJ 7).

3. In any case, the use of company-provided e-mail by trade unions will be subject to a number of limits, since the right to freedom of association, like any other, is not an unlimited right (FJ 8). These limits are:

"a) The communication will not be able to disrupt the normal activity of the company. b) (…) It will not be possible to prejudice the specific business use preordained for it, nor pretend that the interest of trade union use should prevail (…). c) Finally, (...), the use of the business instrument will not be able to cause additional charges for the employer, significantly the assumption of higher costs".

From the doctrine contained in the judgment it can be understood that, indeed, the sending of e-mails by the unions (Staff Boards and more representative unions) to the workers of a company would be protected by the right to freedom of association, as long as and when they are fulfilled the previously set limits and the information sent is of a "trade union and labor nature" (FJ 8).

It should be taken into account that these conclusions remain valid with the RGPD. In this case, the legitimate basis of the treatment, in accordance with the considerations made above, would be given by the fulfillment of a legal obligation applicable to the person responsible for the treatment (art. 6.1c) RGPD).

In short, from the point of view of the data protection regulations, there would be sufficient authorization to provide the requesting union with the data of the corporate e-mail address of the staff of the Generalitat, to guarantee the exercise of the right to freedom of association."

Now, in the case at hand, the person making the claim represents a union which, according to the information contained in the file sent by the GAIP, does not have a presence in any representative body of the Administration of the Government of Catalonia.

The differentiating element between both claims is that, in the case we are dealing with, the claimant union has no representation in the claimed administration.

In this sense, the doctrine of the Constitutional Court embodied in the cited STC 281/2005 was based on the fact that the right to transmit trade union information forms part of the essential content of the right of Article 28.1 of the EC. The exercise of this right was linked to the transmission of trade union and labor information:

"In effect, it must be pointed out, in the first place, that what is contemplated is a right of trade union organizations in the exercise of their representative functions in the company, which is justified only to transmit information of a trade union and labor nature." (FJ.8)

In such a way that it can be concluded that only the "more representative unions and those that have representation in the company committees and in the representative bodies that are established in the Public Administrations or have staff delegates" (using the terminology of article 8.2. of the LOLS) will enjoy the right to use the electronic means that the company makes available to its workers for the transmission by electronic means of information which, necessarily, must have a trade union and labor nature .

This criterion has been shaped, with some nuances, in the jurisprudence that has been produced under the protection of the doctrine of the constitutional court. An example of this embodiment would be the STS of February 21, 2019, which analyzes a case in which the union that requested to be able to use the email provided by the company only had a union section in a center of work (Rec. 214/2017).

The judgment includes the following grounds:

"The Constitutional Court concludes just the opposite, and declares that the company's refusal to allow the use of the same electronic mail tool that it already has installed and in operation, violates the right to freedom of association (art. 28.1 EC).

And it does so based on the following

considerations: a) The right to freedom of association includes the right of unions to develop activities aimed at the defense, protection and promotion of the interests of workers, and to deploy means of action necessary to fulfill the functions that constitutionally correspond to them through the development of their trade union activities in the company or outside it. (...)

c) The right to inform workers, whether they are affiliated or not, is part of the essential content of the fundamental right to freedom of association guaranteed constitutionally, because the transmission of news and the flow of information is the foundation of participation and is configured as an element essential for its

effectiveness. d) The art. 8.1 b) and c) of the LOLS includes the mechanisms for the exercise of that right in the workplace, but this does not mean that they are the only formulas that unions can use to communicate with workers. On the contrary, the use of other communication mechanisms outside working hours that do not disturb the normal activity of the company constitutes a legitimate exercise of trade union

freedom. e) And the legislator not only wanted to guarantee the exercise of those rights, but also imposed certain obligations on the employer to collaborate in facilitating the necessary means that allow the dissemination of union information. As it happens with the rights to a notice board and a suitable premises in those companies or work centers with more than two hundred and fifty workers, regulated in sections a) and c) of the art. 8.2 LOTS.

f) Among the burdens assumed by the company cannot be included the obligation to create an electronic communication tool to facilitate that trade union activity. If the legislator has not expressly provided for it, it cannot be considered part of the right to freedom of association to require the company to establish a certain telematic system for that purpose. Not being able to apply analogously to these effects the provisions on the bulletin boards of art. 8 LOLS, as the right to a kind of digital bulletin board, because there is no legal rule that imposes the creation of other channels or communication and information systems different from those provided for legally.

g) A different question is to analyze whether the union has the right to use for that purpose a pre-existing system in the company, created for productive purposes and, if so, with what limits. (...) h) Approach that falls directly within the scope of the

essential content of the right to freedom of association, to the extent that the negative acts tending to limit it violate that right, "unless they find a justification other than the simple will to hinder its effectiveness", since the employer has in any case an obligation not to unjustifiably or arbitrarily obstruct his exercise.

i) In short, it is about discerning what are the limits so that unions can use "pre-existing means in the company and effective for communication, but not legally required or agreed upon, nor created for union use". (FD 4.3) (...)

"The problem therefore does not reside in the study of the greater or lesser trade union action rights recognized in art. 8 and 10 LOLS but in the analysis of the possibility of using pre-existing communication systems, to assess the extent to which it can be qualified as contrary to the right to freedom of association depending on whether that business decision is more or less justified according to the parameters we have listed above.

The greater or lesser implantation of the union to the effects set forth in the arts. 8 and 10 LOLS could eventually justify that business refusal, in extreme cases in which the union lacks the minimum implantation in the company and despite that intends to use the electronic means of communication existing in the same, in what could be qualified as an abuse of right that must not be supported by the employer due to the concurrent circumstances, and significantly, when it has not also attributed that possibility to other trade union organizations.

But if all other union forces are already allowed to use electronic mail, and the union that is excluded from that possibility proves a certain level of implantation in the company, the legal question then becomes situated in the territory delimited by the Court Constitutional that imposes on the employer the burden of justifying the reasons for said refusal based on the possible impact on the normal performance of the business activity that the recognition of that right could entail." (FD 5.2)

In short, in the case at hand, to the extent that the union that requests access to the e-mails of the corporate mail system that the Generalitat de Catalunya makes available to its workers for the development of the tasks they have entrusted, has no representativeness in the representative bodies of the Generalitat, in accordance with the jurisprudence cited which seems to require a minimum representation of the union in the administrative bodies, it can be concluded that the purpose expressed in the request would not justify the sacrifice of the right to data protection of the affected workers. This, without prejudice to the fact that the union may use the email address of those workers who give their consent to send union information.

conclusion

Access by a union, which does not have representation in the representative bodies of the Government of the Generalitat, to the e-mails of the staff of the Government of the Generalitat distinguishing between official and labor staff and, within each of these classified by departments and bodies, would not be covered by data protection regulations.

Barcelona, May 29, 2019