

Ref.: IAI 20/2019

Claim: 244/2019

Report issued at the request of the Commission for the Guarantee of the Right of Access to Public Information in relation to the claim presented against a university for the denial of access to the report of the internal investigation carried out in a consortium in the year 2015

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 244/2019 presented against a university for denying access to the report of the internal investigation carried out in a consortium in 2015.

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 26, 2019, a citizen submitted a letter to the Secretariat of Universities and Research (SUR) requesting:

"Access the reports, documents and/or files that were made by the public administration (...) in relation to (...), about an anonymous complaint in 2015 that warned of irregularities in the collection of invoices by the director of (...) and the director of (...)."

2. On March 8, 2019, the SUR referred the request for information to the University (...), given that, once the consortium was dissolved and extinguished on September 1, 2018, all the documentation of the consortium has come to be guarded by this University.

3. On April 9, 2019, the University (...), by means of a letter from the Vice-Chancellor for Research, responded to the request for information in the following terms:

"Consulting the documentation operating in the (...), there is the existence of an anonymous complaint, which involved confidential information that concluded that there was no irregular behavior and that it was not necessary to open a procedure administrative

This documentation cannot be provided based on what is established in article 23 of Law 19/2014, of December 29."

4. On April 12, 2019, the applicant filed a complaint with the GAIP against the University (...) for denying her access to the requested public information.

In the letter, the person making the claim specified his request for information in "the report of the internal investigation that was made in (...) on an anonymous complaint in 2015 that warned of irregularities in the collection of invoices by the director of (...) and the director of (...)."

Considers, regarding the reasons for the denial of access adduced by the University, "that it is not proven that they are particularly protected personal data".

5. On May 8, 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 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.

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" (article 4.1)).

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.

In accordance with article 3.1.c) of the LTC, the provisions of this law are applicable "to the public universities of Catalonia and the entities that depend on them or are linked to or participate in them, including commercial companies, foundations and other instrumental entities."

Article 18 of the LTC recognizes the right of people 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).

Article 2.b) of the LTC 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 that supplied by the other obliged subjects in accordance with the provisions of this law".

The claim is filed against the denial of access to "the internal investigation report that was made in (...) on an anonymous complaint in 2015 that warned of irregularities in the collection of invoices by the director of (...) and the director of (...), despite the fact that in the request for information the person now claiming requested the set of information related to the presentation of this complaint.

According to the letter of response issued by the University, this information would be part of a reserved information carried out by the consortium, which was archived when irregular behavior was not proven.

The information that is part of a reserved information, prior to the start of a sanctioning or disciplinary procedure, is "public information" for the purposes of the LTC and remains subject to the access regime provided for in this regulation, which establishes, as a general criterion, that the right of access to public information can only be denied or restricted for the reasons expressly established by law (article 20 et seq.).

These investigative actions are fundamentally aimed at determining, with the greatest possible precision, the facts likely to motivate the initiation of sanctioning or disciplinary proceedings, the identification of the person or persons who may be responsible and the relevant concurrent circumstances.

It is a consolidated jurisprudential criterion that reserved information does not properly constitute an administrative procedure (among others, STSJM 471/2006, of May 24), as well as that its reserved nature (its knowledge can lead to a clear detriment to the result of the same) prevents access to its content during its processing (among others, STS 21/2018, of February 15). And this even affects the person being investigated (among others, STSJC 1212/2005, of November 25).

Along these lines, the LTC expressly establishes the possibility of limiting or denying access to public information if its knowledge or disclosure entails a detriment to the investigation or sanction of the criminal, administrative or disciplinary offense in question (article 21.1.b)).

In the case at hand, proceedings have been archived, so that, at the outset, this limit for access in Article 21.1.b) of the LTC would not apply. It is necessary to analyze, therefore, whether any other limitations than those established in the LTC or in any other law apply.

As has been said, the claim focuses on the report resulting from the internal investigation that was carried out in the consortium and that would be the basis for the archive of the actions by the competent body. Despite not knowing the specific content, it is foreseeable that it will include information relating to the people under investigation and, in greater or lesser detail, the statements of, where appropriate, possible witnesses, as well as other considerations and evaluations (result of the diligence carried out) in basis on which the instructing person would have proposed t

Therefore, in this report (as, in fact, in the rest of the documentation that may be part of the reserved information) there may be personal data, not only of the people investigated or reported, but also of other people, such as the instructing person and, if applicable, the witnesses. There would be no data on the reporting person, given that, according to the information provided, the reporting of the facts in the present case would have been made anonymously.

Access to this personal information by the claimant will be governed by the criteria established in articles 23 and 24 of the LTC.

III

Article 24.1 of the LTC provides 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.”

This precept would enable, except in the event of exceptional circumstances, the disclosure of the identity of the persons who have intervened in the reserved information in attention to the functions attributed to them by reason of their position (for example, of the instructing person or of the person who decides the opening or, in a case like the one at hand, the archive of the reserved information).

Therefore, there would not be a priori disadvantages, from the point of view of data protection, for it to be facilitated for the person claiming the name and surname of the person instructing the reserved information carried out in the consortium and who would have signed the controversial report.

IV

Article 23 of the LTC states that "requests for access to public information must be denied if the information sought contains particularly protected personal data, such as those relating to ideology, trade union affiliation, 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 party expressly consents to it by means of a written document that must accompany the request."

For its part, article 15.1, paragraph two, of Law 19/2013, of December 9, on transparency, access to public information and good governance (LT), establishes that "if the information includes personal data that refer to racial origin, health or sexual life, include genetic or biometric data or contain data relating to the commission of criminal or administrative offenses that did not lead to a public reprimand to the offender, access may only be authorized in the event that it is counted with the express consent of the person affected or if he was covered by a rule with the rank of law."

In the report resulting from the reserved information it is clear that there will be information relating to the person or persons reported or investigated by the alleged commission of some type of administrative offense or punishable offense in disciplinary matters.

From the perspective of data protection, despite the fact that the previous actions end with their archive and no sanctioning or disciplinary procedure is initiated, the information about the persons reported or investigated is considered information related to the commission of administrative offenses .

It should be borne in mind that the mere fact of providing information about a person who has been investigated in relation to conduct or facts in order to find out whether or not they are punishable, even if it is ultimately determined that they are not, could cause a serious harm to the privacy of the person affected, particularly, in view of the nature and seriousness of the facts investigated. This means that, despite the doubt that may arise regarding its inclusion in the access regime of article 23 of the LTC - because the sanctioning or disciplinary procedure has not been initiated -, a reasoned weighting between the different rights and interests at stake that would have to be done in accordance with article 24.2 of the LTC, would also oblige us to take into account this circumstance that could lead to a denial of access to this information.

The LTC excludes the possibility of accessing information related to the commission of criminal or administrative infractions, unless the sanction or penalty entails a public reprimand to the offender or the express consent of those affected in the time of formulating the request. It is not recorded that this consent was provided in the present case.

Therefore, the access of the claimant to the personal information of the person or persons under investigation included in the report resulting from the reserved information should be limited on the basis of what is provided for in Article 23 of the LTC.

Having said that, it should be noted that the transparency regulations enable the possibility of giving access to public information with the prior anonymization of personal data (article 15.4 LT).

Now, in the case at hand, it seems that anonymization would not be a viable mechanism to provide access to information, given that, given the terms in which public information is requested, it seems that the person making the claim could already know the identity of the person or persons investigated by the consortium.

v

With regard to the information that may be contained in this report about other people, in particular, the different witnesses who, if applicable, have declared in the reserved information, access should be resolved in accordance with article 24.2 of the LTC.

This article 24.2 of the LTC provides that "access to information can be given, with the previous reasoned weighting of the public interest in disclosure and the rights of the people affected. 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 the present case, it must be taken into account, for the purposes of said weighting, that the information declared or provided by these persons, in their capacity as witnesses, does not constitute only information relating to their person, but also information relating to the possible commission of infractions by the persons under investigation. Therefore, access to this information would be limited in this respect on the basis of Article 23 of the LTC.

Beyond this, it must be borne in mind that the reserved nature of actions that are part of reserved information means that these people who declare or provide information about this type of investigation do so in the confidence that, without prejudice to access necessary to guarantee the right of defense of the persons responsible, their identity is preserved.

It is, therefore, also relevant the position of the person requesting access, as well as the explicit purpose pursued with this access. It is certainly not mandatory to include the reasons in the applica

for which access is requested (articles 18.2 and 26.2 LTC) but, if not done, this element cannot be taken into account when assessing the different rights and interests at stake.

In this case, and due to the information available, it must be taken into account that the person making the claim would not have intervened in the reserved information, neither as a whistleblower nor as a witness.

It also does not specify the purpose or the reasons to which your request responds, so access should be framed within the evaluation and control of the performance and the holding of accounts of the Administration to the citizenship

All of this would also limit the claimant's access to the personal information about the witnesses that may be contained in the report resulting from the reserved information.

conclusion

The person claiming would have the right to know the identity of the person who has drawn up the report resulting from the reserved information. Beyond that, by application of the limitations provided for in articles 23 and 24 of the LTC, access to said report should be denied, unless the affected persons give their consent.

Barcelona, May 28, 2019