

Ref. : IAI 23/2019

Claim: 233/2019

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 presented by a citizen against a city council for the denial of access to various information on restoration files of urban planning legality.

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 233/2019 presented by a citizen against a city council for the denial of 'access to various information on restoration files of urban planning legality.

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 13, 2019, a citizen submitted a letter to the City Council - in his own name and on behalf of the AP7 GRATUÏTA JA Transversal Movement and the Federation (...) of Neighborhood Associations -, in which requests access, to various information on the files for the restoration of urban legality initiated in polygons 6 and 7 of the Rural Cadastre (...), under the protection of the Transparency Law and prior to anonymization, if applicable, of protected personal data. In particular, it is interesting to obtain the following information:

1. What cases of restoration of urban legality (suspension or stoppage of works without a license) have been initiated in these estates, during the period between January 1, 2010 and December 31, 2018.
2. What is, in each of the files referred to, the legal precept or precepts or regulations of the General Urban Planning Plan (...) that have allegedly been infringed.
3. That it be indicated, in each of the files referred to, if the works were being carried out without a municipal works license or without conforming to the license granted, and the reason why they did not conform to the license.
4. How each of the referred files was finally resolved. In this sense, a copy of the agreement or final resolution of each of them is requested, in order to know how the urban legality has been restored in each case (if the City Council has ordered the demolition of the works, if 'have adjusted to the license granted or to the urban planning legality, if the filing of the file has been ordered, and in this case, the reason and the date, etc.)
5. Who were the authorities and public employees in each file, responsible for carrying out the corresponding inspections, proposing and agreeing the initiation, processing and instructing, filing or

solve the files, draw up reports or draw up inspection reports, as well as carry out actions to check compliance with the resolutions.

2. On February 25, 2019, the City Council responded to the access request indicating to the interested party that the information subject to the request contains personal data that must be processed applying the criteria provided for in articles 23 and 24 of Law 19/2014, and which can be consulted as soon as they have the requested documentation.

3. On April 8, 2019, the interested party's claim against the City Council was received by the GAIP, considering that their request was denied.

He points out that the City Council has not informed them that the request has been transferred to affected third parties, and they state that strictly speaking the access should not affect the rights and interests of third parties, given that it was already indicated in the request that the information was requested, if necessary by anonymizing the "protected personal data of natural persons".

He expresses his interest in accessing exclusively documentation of restoration files of urban planning legality and not of sanctioning files.

At the same time, he points out that with regard to the information about the authorities and staff at the service of the City Council in charge of the various functions, the identification data is requested: "name of the respective position and/place of work, with indication for each case of the service relationship of the person occupying it at any given time with the City Council (career official with the position owned or not, or official with an interim appointment, or labor contract, or consultant or related external professional for a service contract, and of what class, etc.)"

4. 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 governance, 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. 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

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), extends its scope of protection to personal data understood as all information about an identified or identifiable natural person, and considers an identifiable natural person "any person whose identity can be determined, directly or indirectly, in particular by means of an identifier, como por ejemplo a number, 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 that person;" (Article 4.1 of the RGPD)

Therefore, the data of legal entities are excluded from this scope of protection, as specified by the RGPD itself, by establishing that "The protection granted by the present Regulation must be applied to natural persons, regardless of their nationality or your place of residence, in relation to the processing of your 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, there must be no inconvenience from the perspective of data protection regulations in providing the interested party with the information referring to legal entities that may be contained in the requested documentation and/or information.

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."

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). In accordance with article 6.1 of the RGPD, in order to carry out a treatment, it is necessary to have a legal basis that legitimizes this treatment, either the consent of the affected person, or any of the other circumstances, such as "the treatment is necessary for the fulfillment of a legal obligation applicable to the person responsible for the treatment" (letter c

As can be seen from article 6.3 of the RGPD and expressly included in article 8 of Organic Law 3/2018, of December 5, on the protection of personal data and guarantee of digital rights (LOPDGDD), the processing of data can only be considered based on these legal bases of article 6.1. c) and e) of the RGPD when so established by a rule with the rank of law.

At the same time, 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, body or entity 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."

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

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

The second additional provision of the LOPDGDD, states that "Active advertising and access to public information are regulated by Title I of Law 19/2013, of December 9, on transparency, access to public information and good governance , as well as the active advertising obligations established by regional legislation, will be subject, when the information contains personal data, to the provisions of articles 5.3 and 15 of Law 19/2013, in Regulation (EU) 2016/679 and in this organic law."

Article 18 of Law 19/2014 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 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".

The purpose of this claim is to access various information and/or documentation on files for the restoration of urban legality, information that is "public" for the purposes of article 2.b) of the LTC and, therefore, remains subject to the right of access (art. 18 of the LTC).

In accordance with article 20 and s. of the LTC, the right of access to public information (article 18 LTC) can be denied or restricted for the reasons expressly established in the laws. Specifically with regard to information that contains personal data, it is necessary to assess whether the right to data protection of the affected persons would justify or not the limitation of the right of access to public information invoked by the individual bidding

III

Legislative decree 1/2010, of August 3, which approves the Revised Text of the Urbanism Law (hereafter TRLU) regulates the protection of urban planning legality, in articles 200 to 254 TRLU.

In accordance with article 199 TRLU "1. All actions or omissions that allegedly entail a violation of the determinations contained in this Law, in urban planning or in municipal urban ordinances, subject to sanctions in accordance with the provisions of this Law and the regulations that implement it, must give place to the administrative actions necessary to clarify the facts and, subsequently, or directly, if no prior information is required, to the initiation of a file for the protection of urban planning legality.

2. The power to protect urban planning legality is mandatory. The exercise of this power gives rise to the instruction and resolution of a procedure or of more than one whose object, jointly or separately, is the adoption of the following measures: a) The restoration of physical reality altered and of the violated legal order. b) The imposition of sanctions. c) The determination of damages and losses caused."

Under the title "Work suspension orders and legalization requirements", article 205 TRLU establishes: 1. The relevant administration must initiate the procedure for the protection of urban legality in relation to acts of building or of land and subsoil use that are carried out without the administrative title that enables them to be carried out or without the required prior communication, or those that do not conform to the content of the administrative title granted or the prior communication carried out(..)"

Through this procedure, the Law implements the regulatory system that must guarantee that acts of land use and building conform to the determinations contained in the TRLU, urban planning and municipal urban ordinances.

Emphasize that these are not procedures of a punitive nature. Thus, in accordance with repeated jurisprudence, in the face of a violation of planning legality, it is necessary to distinguish between the power to sanction if it is typified as a planning violation (as required by Article 25.1 EC), and the administrative power to restore the order violated, through the adoption of the necessary measures for the re-establishment of the infringed urban order that do not have the nature or character of a sanction.

In this sense, under the title "Restoration of the altered physical reality", article 206 of the TRLU provides for the different measures that the City Council must take depending on the specific irregular situation produced.

"1. Once the period of two months established by article 205 has passed without the relevant enabling administrative title having been requested, without the required communication having been made or without the works or actions having been adjusted to content of these, the competent body, through the resolution of the restoration procedure, must agree to the demolition of the works, at the expense of the person concerned, and must definitively prevent the uses to which they could give rise. It must proceed in the same way if the works or actions are manifestly illegal or if the enabling administrative title is refused because the fact of granting it would be contrary to the p

2. If, in the event referred to in paragraph 1, the person concerned does not carry out the agreed restoration measures within one month, the competent body can order their compulsory execution.

3. In the cases of subsidiary execution of the agreed restoration measures, the restoration order that is issued enables the execution of the works in question, and in no case is it required to apply for a planning permit. For this purpose, the authority that subsidiarily executes the order issued must prepare and approve the technical project that allows the material execution of the works at the expense of the person who is obliged t

In turn, articles 211 et seq. of the TRLU regulate the system of infringements and sanctions in urban planning matters.

In this regulatory context, and in view of the information and/or documentation requested by the claimant, it is necessary to analyze the different personal data that would be affected by the access, distinguishing on the one hand, the personal information of the authorities or public employees involved or in charge of the various actions carried out in the respective files, and on the other hand, the people interested in the different files as responsible for the alleged urban illegalities that would have motivated their initiation.

IV

With regard to the information on the authorities and staff at the service of the city council in charge of the different tasks and functions in each of the requested procedures, article 24.1 of the LTC, "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".

This precept includes the identification data (name, surname and position) of the employees or public officials responsible for the actions carried out in the different procedures, and is therefore information that must be given to the claimant, unless there are special circumstances that require the protection of the affected person.

The claimant asks in the letter of claim to indicate "for each case the service relationship of the person who occupies it at any time with the City Council (career official with the position

owned or not, or civil servant with interim appointment, or labor contract, or consultant or external professional bound by a service contract, and of what class, etc.)"

Article 9.1.e) of the LTC imposes the obligation to publish "The calls and the results of the selective provision and professional promotion processes". In other words, when the selection process is carried out in order to be able to occupy a certain job, it is necessary to give publicity to the person who obtained it. This will allow the person to be identified and linked to a specific workplace.

Taking into account these forecasts, it does not seem that it can be justified to limit the claimant's access to specific information about the official or work relationship of these people with the City Council.

In the event that this link has its origin in a contract for the provision of services, remember that article 13.1 LTC, obliges the City Council to publish, among others "d) The contracts signed, with the indication of the object, the tender and award amount, the procedure used to contract and the identity of the successful tenderer, the duration, the number of tenderers, the award criteria, the comparative table of offers and the respective scores, and also the agreements and technical reports of the procurement process. This information must be up-to-date and refer to at least the last five years."

The obligation to publish covers all contracts, including minors, and regardless of whether the successful tenderer is a legal or natural person, and enables public access to the identity of the successful tenderer, the subject of the contract and the tender and award amount, including contract modifications and contract extensions, among other data. Consequently, there must also be no inconvenience in facilitating the claimant's access to said information.

v

With regard to the information about the people interested in the respective procedures for the restoration of urban legality, and given the non-sanctioning nature of this type of file, it does not seem a priori that access could affect data considered particularly protected in the terms provided for in article 23 LTC. In the event that there is information of this type and in the absence of express consent of the holder, access should be limited.

Beyond the specially protected data referred to in article 23 of the LTC, and in accordance with article 24.2 LTC, a weighting must be done between the public interest in the disclosure of information and the right to data protection of the affected persons:

"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 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 matters of urban planning, the right of access to information is particularly relevant given the recognition of public action (Article 12 of the Revised Text of the Urban Planning Law approved by Legislative Decree 1/2010, of August 3 , TRLU), from which any citizen can demand before the administrative bodies and before the administrative contentious jurisdiction the compliance with the legislation and urban planning, an exercise that must be adjusted to what is established by the applicable legislation.

The power to protect urban planning legality attributed to the City Council is mandatory. In this sense, and for the purposes of transparency, any citizen must be recognized the right to access any information that allows him to check whether or not the infringed urban legality has been restored and to evaluate the management carried out by the City Council in the exercise of 'these powers.

To this end, it may be relevant to know the different files that have been initiated, the planning regulations allegedly infringed, or the specific irregular situation that would have motivated the City Council's action, as well as the result of the actions. The claimant requests that it be specified whether the affected works were carried out without a municipal license, or without conforming to the license granted, and in the latter case, the reason why they did not conform, as well as the information on the result of the proceedings, which is why it is of interest to obtain a copy of the agreement or resolution of the respo

Indeed, access to the content of the agreement or resolution of the file would allow the claimant to know in which cases legality has effectively been restored and/or in which cases the file has been filed and the reason why has filed

In fact, article 204 of the TRLU, in the context of the collaboration of the Land Registry in the effectiveness of administrative acts in urban planning, states that "1. The administrative agreements regarding the protection of urban legality regulated by the applicable land legislation are recorded in the Property Registry, in accordance with the mortgage legislation.(..).”

Apart from the above, section 2 of this same precept empowers the competent bodies in urban planning matters to "urge the Land Registry to carry out the corresponding settlement with respect to the following administrative acts:

a) The suspension of acts of construction or use of the soil or the subsoil carried out without a license or without an execution order, or without conforming to the conditions established therein. b) The suspension of the effects of a license or an execution order and the stoppage of the works started under this. c) The declaration of harmfulness of a license or an execution order. d) The administrative annulment of a license or an enforcement order or the administrative resolution issued in execution of a sentence that has declared the annulment.

e) The agreement to demolish and restore the land to the state prior to the execution of the works constituting the infringement. f) The resolution that, for certain mortgage farms, finds that the buildings or facilities are out of order. g) The administrative resolution agreeing to the forced execution of acts adopted under this Law. h) Resolutions that put an end to a procedure for the protection of urban legality."

Taking into account the regulatory provisions regarding the registration publicity of the various measures adopted in the matter of re-establishment of urban legality, it does not seem that the claimant's right to obtain the requested information can raise doubts. This is, without a doubt, information that is of obvious public interest for the purposes of checking whether or not urban planning legality has been restored and evaluating the City Council's management in this matter.

Access by third parties to information about the commission of planning illegalities can have harmful effects on the people responsible for these alleged illegalities. Although a priori, it should not be relevant for the purposes of carrying out this assessment who the non-compliant persons are, it cannot be ruled out that in certain cases it may be. Thus, for example, it could be relevant to know who has benefited as a result of the City Council's inaction, in the event that the file expires.

In this case, the purpose of the access is, as indicated by the claimant, to find out the reasons that justify the construction of several roundabouts on the N-340 road as it passes through (...), and to know who may ultimately be harmed and/or benefited from the construction of these roundabouts. At the same time, however, it requests the information, if necessary, anonymizing the personal data of the natural persons affected.

In the letter of complaint, he considers that in strictness the access should not affect the rights or interests of third parties, insisting on the fact that the documentation was already requested, if necessary, anonymizing the data of the natural persons affected.

The principle of data minimization (Article 5.1 c) RGPD) requires that the data subjected to processing are adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed.

Taking into account that the requested information could also be provided without the need to facilitate the identification of the interested persons, and that in view of the terms in which the request is made, it does not seem a priori that it is of interest to the claiming to identify the natural persons interested in the respective procedures, the privacy of these persons should be respected as far as possible. For this purpose, data that is unnecessary to achieve the purpose pursued, such as the name and surname of the persons interested in the respective resolutions, or any other data that is irrelevant for the purposes of satisfying the claimant's right of access, could be omitted.

Warning that the fact that these data are omitted does not mean that the information referring to these people has been anonymized. Anonymization would require the elimination of all information that could allow the identification of the person or persons affected, taking into account not only the information contained in the document that is delivered but the data that can be obtained by others

ways, assessing whether or not there is a real risk of re-identifying the affected people without making disproportionate efforts.

In the case at hand, it is possible that the claimant can find out by himself or through the neighbors who are the owners or responsible for the buildings affected by the different files, but in any case, the removal of the first and last names or other data identifiers that may be included, would be more respectful of the principle of data minimization.

CONCLUSION

The data protection regulations would not prevent access to the requested information about the people responsible for the different municipal actions in the procedures for restoring the urban legality claimed.

On the other hand, and given that the same request allows for the possibility of obtaining anonymized data, the principle of minimization would justify omitting the identifying data of the natural persons interested in the respective files.

Barcelona, June 6, 2019