

Ref. AJ : IAI 24/2019

Claim: 234/2019

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 city council for the denial of access to various information on various public works and modifications of the general urban planning plan in the polygons 3 and 4 of the land register of that municipality.

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 231/2019 presented by a citizen against a city council for the denial of 'access to various information on various public works and modifications to the town's general urban plan in the area of polygons 3 and 4 of the Rural Register of that town hall.

Having analyzed the request, which is accompanied by a copy of the administrative file processed before the GAIP, in accordance with the report of the Legal Counsel I issue the following report:

Background

- 1. On February 13, 2019, a citizen presented a letter to the City Council -in his own name and on behalf of the AP7 GRATUÏTA JA Transversal Movement and a Federation of Neighborhood Associations-, in which he requested the 'access, to various information about various public works and modifications of the general urban development plan in polygons 3 and 4 of the Cadastre de Rústica of that town hall during the period from January 1, 2010 to December 31 of 2018, under the protection of the Transparency Law and prior anonymization, if applicable, of protected personal data. In particular, it is requested:**
 - Copy of the files processed for the construction works, opening, arrangement, paving or any other action relating to roads executed in those two estates, and the cost of each of them.**
 - Copy of the files initiated for the specific modification of the general urban plan of the municipality in the area of those two polygons during the indicated period, and the cost of each one in the case that they have been entrusted to an external architect or technician.**
- 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.**

At the same time, the interested party is informed that, with regard to the years 2016, 2017, 2018 and 2019, a copy of all the minutes of the local government board, where the agreements adopted appear, are available at the corporate electronic headquarters in each subject, and where the nature of the technical report issued in the planning file is stated.

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 expresses his interest in accessing the minutes of the Local Government Board, the Plenary and/or the resolutions of the mayor's office and the delegated councilors issued before the year 2016, given that these are documents that are not published at the corporate head

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".

It specifies that the requested documentation refers only to files already processed for works and roads and for the timely modification of the municipality's General Urban Plan and requests that its right to access the information be recognized in the terms set forth in the application initially submitted.

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 a natural 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 establishes 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".

III

With regard to access to public works files executed by the City Council, access is requested to files processed for construction, opening, arrangement, paving or any action related to roads executed in the estates 3 and 4 of the Rural Register of that municipality, and the cost of each of them.

The set of documentation related to the processing of the process of drawing up and approving the work project, in the terms provided for in articles 37 and 38 of the ROAS, includes the act of initial and final approval, the project, the eventual allegations presented during the public information procedure and individual notification if applicable, to the rights holders, as well as other administrative acts of the procedure.

The works project must contain, at a minimum, the report, a budget, the specific technical prescriptions document where the works are described and their execution regulated, the plans (art. 24 ROAS), as well as the rest of the additional documentation that is appropriate, such as if it is

the case, the detailed list and valuation of the assets to be occupied and, if expropriated and the list of their owners (art. 25.2.c) ROAS).

On the other hand, the file will include the set of documentation related to the execution of the work and the management of the work, and which consists of the technical and administrative documents (Actes de verificació del replanteig, start of work, reception of work, work certifications). Both the work project and the execution can be carried out by the technical services of the same local body, or it can be awarded to a third party through the execution of a contract under the terms provided for in Law 9/2017, of 8 of November, on Public Sector Contracts, by which Directives of the European Parliament and of the Council 2014/23/UE and 2014/24/UE, of 26 February 2014, are transposed into the Spanish legal system, (hereinafter LCSP), In this case the prior processing of the corresponding procurement file is required.

Placed in this context, and taking into account the type of documents that would in principle be contained in these files, it can be warned a priori that these may contain numerous personal information that may refer to the different agents involved in the execution (the author of the project, the person responsible for the execution, the builder, the works director, etc..) as well as the owners or holders of affected rights, or any person who has submitted allegations to the works project, in the public information procedure provided for in article 37 and 38 of the ROAS.

With regard to article 24.1 of the LTC, in principle there would be no problem to be able to identify the public employees who have intervened due to their position in the processing of the requested files. In this case, the identification data (name and surname and position held) of each of the agents involved would be included: the author of the work project, in case it has been drawn up by a specialist who is part of the technical services of the City Council, any of the technicians who participated in the preparation of the reports, as well as the construction manager - if he is a City Council employee - who is responsible for checking and monitoring the correct performance of the work, and must assume final responsibility for the execution of the project before. It would also include the identification data of the rest of the City Council's public employees who have intervened in the administrative processing of files in the exercise of the functions of the position they hold.

With regard to the rest of personal information, which in principle does not seem to have to include data specially protected from those provided for by article 23 of the LTC, the prior weighting required in the article must be done 24.2 LTC.

IV

With regard to personal information about the different agents involved in the process (designers, builders in charge of execution, or the director of the work if this is an external practitioner hired by the city council), remember that in of administrative contracting, article 13.1. of the LTC obliges the Administration to publish, among others "d) The contracts signed, with the indication of the object, the amount of the tender and award, 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 contracting 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 should be no inconvenience in facilitating access to information on the identity of any of the people who have been awarded the respective contracts, - designers, builders and/or external construction managers, as well as the data about the project and the specific work contracted (object of the contract), the price paid for the provision of the service or the completion of the work (award price), as well as information about the modifications or extensions granted.

The information that may be contained in the reference files would in any case be information linked to the business or professional activity of the agents involved. In the case of builders (individual entrepreneurs), it cannot be ensured that this information, originally referred to the company, does not end up affecting the entrepreneur and his privacy. However, it cannot be concluded that the fact of knowing who has drawn up one or several projects, who has built one or several works on behalf of the municipal administration, or who is the practitioner in charge of the construction management, must necessarily cause harm from the point of view of your privacy.

The purpose pursued by the claimant must be framed in the participation of citizens in the control of administrative management and the guarantee of the retention of accounts by those responsible for public management, especially in those actions that have a clear impact on use of public resources. From this perspective, access to the technical, administrative and economic documentation that may form part of a works file promoted by the local entity, may be relevant for the purposes of being able to verify eventual irregularities in public management in public works matter.

Public access to the identity of the awardees is already provided for in the transparency legislation and the publication of the object of the contract, the award price, as well as possible contract modifications or extensions is also provided for. Access to the rest of the technical documentation that had been prepared and contained in the file, would not imply a greater interference in the privacy of those affected and instead is information that, as we have pointed out, may be relevant for the purposes of evaluating the management administrative in the area of the execution processes of local bodies, management that has a direct impact on public resources.

It is true that the claimant requests the information anonymizing, if necessary, the data of the natural persons affected, but taking into account the nature of the data, the provisions of the legislation on transparency in matters of recruitment and the purpose pursued by this legislation, it would not be justified to limit access to the identity of these awardees, responsible for the execution of the municipal works subject to the claim, which is why the claimant's right of access must prevail in this case.

However, by application of the principle of minimization, it would be necessary to omit beforehand, those identifying data (such as the NIF, telephone numbers, electronic addresses, or the address of the affected persons), as well as other personal data that, beyond the identification of these agents may appear there and are unnecessary to achieve the goal of transparency pursued.

With regard to the information that may exist about third parties who could have intervened (for example, people who could have submitted allegations during the public information period to which the works project must be submitted before its final approval), taking into account the terms in which the request is formulated, the need to sacrifice the privacy of these people is not appreciated.

If the objective is to control the actions of municipal managers in the management of public works, it could in any case be relevant to know whether or not allegations were presented, in what sense and what was the response of the 'Administration, but this information should be able to be provided without the need to identify the people affected. From the claimant's own statements when requesting access, it does not appear that it is necessary to obtain said information, and therefore the identifying data of these people that may appear in the requested documentation should be omitted.

Finally, in anticipation of article 25.2.a) of the ROAS, the documentation of these files could include "a) The detailed list and valuation of the assets to be occupied and, where appropriate, expropriated and the relationship of its holders."

With respect to these holders, it should be borne in mind that the 17 et seq. of the Expropriation Law Forçosa, of December 16, 1954 (LEF), provide that once the initial list of assets and rights affected has been approved, a period of public information must be opened so that the owners who are affected can legislate what they consider relevant in order to correct the errors in the approved relationship.

Specifically, the regulations provide for the publication of the list of assets and rights affected by the expropriation to be published through the insertion of advertisements in the official gazette of the province, in one of the most widely circulated newspapers in the province and at the counter of 'corresponding announcements, which must contain the registration data of the affected estates, including the address, owner, charges, employment status, etc.).

For purposes of transparency and control of administrative action in the matter of expropriations, it may be relevant not only to know which properties have been affected but also the identity of the people who could have benefited from an eventual forced execution as a result of the municipal works carried out. Taking this into account, and since it is already planned to publish the identity of these holders in the official newspapers, it does not seem that it can be justified in this case to limit the claimant's access to said information.

However, it would be necessary to omit beforehand, those identifying data (such as the NIF, telephone numbers, electronic addresses, or the domicile of the affected persons), as well as other personal data that, beyond the identification of these persons, may be included and are unnecessary to achieve the goal of transparency pursued.

v

In relation to the one-off modification of the municipality's general urban plan, the claimant requests a copy of the files initiated in the field of estates 6 and 7, during the period from January 1, 2007 to December 31 of 2018, as well as the corresponding cost, in the event that an external architect or technician has been commissioned.

With regard to urban planning and management processes, the urban legislation regulates in detail the procedure for publicity and citizen participation. Thus article 8 of Legislative Decree 1/2010, of August 3, which approves the Revised Text of the Planning Law, establishes that:

"5. Citizens have the right to consult and be informed about the content of urban planning and management instruments and, for these purposes:

a) In the public information of the urban planning instruments, it is necessary that, together with the plan, a document covering the following extremes is exposed:

first Plan delimiting the areas subject to suspension of licenses and processing procedures, and specification of the suspension term and the scope of the licenses and processing that are suspended.

second A summary of the scope of their determinations and, in the case of the review or modification of an urban planning instrument, a map identifying the areas in which the proposed arrangement alters the current one and a summary of the scope of this alteration.

(...)"

In addition, in matters of urban planning, the right of access to information is particularly relevant given the recognition of public action (Article 12 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. Consequently, the public action allows anyone to contest the different instruments of arrangement, as well as the acts of their application and to access public information for that purpose.

In accordance with article 59 of the TRLU, municipal urban planning plans must contain a descriptive and justifying report of the plan, the complementary studies, the information and urban planning plans of the territory, the urban rules, the catalog of assets to be protected, the agenda and the economic and financial evaluation of the actions to be developed, the environmental documentation, the municipal planning action program, if applicable, a

Also, article 73 of the TRLU foresees that the competent bodies can agree to "suspend the processing of specific derived urban planning plans and urban management and urbanization projects, as well as suspending the granting of plot licenses- acquisition of land, construction, reform, rehabilitation or demolition of buildings, installation or extension

of specific activities or uses and other related municipal authorizations established by sectoral legislation.”

In accordance with the aforementioned regulations, the files for the modification of the urban planning will contain, in addition to the documentation referred to in article 59 and 8.5.a) of the TRLU, the result of the corresponding administrative processing, among which, the one corresponding to public information, mandatory in the processing of urban planning procedures. In addition, it could also incorporate, when the drafting of the planning review project has not been carried out by the technical services of the same local entity, the external contracting

In this context, and taking into account the type of documents that would in principle be contained in these files, it can be foreseen that these may contain numerous personal information that may refer both to the different agents involved (the authors of the descriptive report, of the plans, and the rest of the technical documentation that makes up the file), such as the persons holding affected rights, or any person who has submitted allegations in the corresponding public information procedure.

As already explained in the fourth legal basis of this report, access must be given to the personal data of the employees or public officials involved, which are contained in the documentation that is part of the planning modification file, as well as those responsible for the preparation of the technical documentation, when they have been prepared with the city council's own means, by application of article 24.1 of the LTC, insofar as it is merely identifying data directly related with the organization, operation or public activity of the Administration.

By application of the principle of minimization provided for in article 5.1.c) of the RGPD, these data must be limited to those necessary for their identification (name, surname and position).

With regard to the rest of personal information, the criteria set out in the fourth and fifth legal bases of this report are reproduced according to which, beyond the data considered specially protected in article 23 of the LTC (which, if it exists, access should be limited) the prior weighting required in article 24.2 LTC must be carried out, with the same result as stated in the aforementioned grounds.

Consequently, with regard to the identification data of those responsible for the preparation of the technical documentation that makes up the file, in case it has been the subject of external contracting, and the cost thereof, in accordance with the obligations of active advertising in matters of administrative contracting of article 13.1. of the LTC, would have no problem in providing access to this information.

Finally, with regard to the information that may be contained on third parties who could have intervened, (people who could have submitted allegations during the public information period), taking into account the terms in which the request is formulated not the need to sacrifice the privacy of these people is appreciated.

As has already been explained, if the objective is to control the actions of municipal officials in the processing of the planning modification file, it could in any case be relevant to know whether or not allegations were presented, in what sense and what was the Administration's response, but this information should be able to be provided without the need to identify the people

affected From the claimant's own statements when requesting access, it does not appear that it is necessary to obtain said information, and therefore the identifying data of these people that may appear in the requested documentation should be omitted.

CONCLUSION

Data protection regulations would not prevent access to information that does not contain personal data.

With regard to the information that may contain personal data, the data protection regulations would not prevent access to the merely identifying data of public officials or employees that, in the exercise of their functions, may appear in the different requested documentation .

Nor would it prevent access to information about the professionals who may have been hired for the execution of the municipal works as well as that related to the professionals in charge of preparing the technical documentation that makes up the files, nor to that referring to the people owners of expropriated goods or rights. All this, without prejudice, to omit from the documents to which access is given, the personal data (DNI, addresses, telephones or others) that are not necessary for the fulfillment of the intended purpose.

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 physical persons holding urban and environmental licenses that may appear in the documentation claimed

Data protection regulations would not allow access to the personal data of third parties who could have intervened during the public information periods of the corresponding administrative procedures.

Barcelona, June 4, 2019