

Ref.: IAI 27/2019

Claim: 138/2019

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 of a trade union section to the list of overtime hours worked by the workers of a City Council during the year 2018

The Commission for the Guarantee of the Right of Access to Public Information (GAIP) asks the Catalan Data Protection Authority (APDCAT) to issue a report on claim 138/2019 submitted in relation to the denial of access to 'a trade union section in the list of overtime hours worked by the workers of a City Council during the year 2018.

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 January 10, 2019, a Trade Union Section at a City Council requested from that City Council "the list of overtime hours worked by each employee, both paid and compensated in hours, during the year 2018. "
2. On March 13, 2019, a claim against the City Council was presented to the GAIP.
3. On March 18, 2019, the GAIP requested the report from the City Council in relation to this claim, without that, on the date of issuance of this report, this Authority was informed of the issuance of the report by the City Council.

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 data protection

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, understood as any numerical, alphabetical, graphic, photographic, acoustic information or of any other type relating to physical persons identified or identifiable without disproportionate efforts (arts. 5.1.f) and 5.1.o) of the Regulations for the deployment of the LOPD, (RLOPD), approved by R. decree 1720/2007, of December 21). 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 (RGPD), defines personal data as (hereinafter, "all information about an identified natural person identifiable (the "data subject"); 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;

The data available to the City Council, which identify and refer directly to workers, as well as other data that may refer more specifically to the workplace they occupy, but which can be associated or can be linked to a specific worker, and which therefore identify you, are personal data and are protected by the principles and guarantees established by the RGPD.

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, letter c) enables the treatment if "it is necessary for the fulfillment of a legal obligation applicable to the person responsible for the treatment" and letter e) states that the treatment will be lawful if "it is

necessary for the fulfillment of a mission carried out in the public interest or in the exercise of public powers conferred on the person responsible for the treatment”.

Article 6.3 of the RGPD establishes that the basis of the treatment indicated in Ird letters c) and e) of article 6.1 must be established by the Law of the European Union or by the law of the Member States that applies to responsible for the treatment. The referral to the legitimate basis established in accordance with the internal law of the member states referred to in this article requires, in the case of the Spanish State, that the development norm, as it is a fundamental right, has rank of law (Article 53 CE), as recognized in Article 8.2 of Organic Law 3/2018, of December 5, on the protection of personal data and guarantee of digital rights (LOPDGDD).

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

Specifically, article 18 of the LTC establishes that "people have the right to access public information, referred to in article 2.b, individually or in the name and representation of any legal entity legally constituted" (section 1). The mentioned article 2.b) defines "public information" as "the information prepared by the Administration and that which it has in its power as a result of its activity or the exercise of its functions, including the which are supplied by the other obliged subjects in accordance with the provisions of this law". Therefore, the information requested is "public information" subject to the access regime provided for in the transparency legislation.

The claim is lodged against the lack of response to the request for access to the list of overtime hours worked by City Council workers in 2018. This information is public information for the purposes of article 2. b) LTC and, therefore, remains subject to the access regime provided for in the transparency legislation.

In this context, it is necessary to analyze whether, through the exercise of the right of access to public information recognized in the transparency legislation, there would be legal authorization for the claimant to access said information.

III

The public information that is intended to be accessed contains personal data. In this sense, and from the point of view of the right to the protection of personal data, it is necessary to take into account the limits provided for in articles 23 and 24 of the LTC. Workers' remuneration information is not considered particularly protected data (article 23 LTC). Therefore, article 24.2 LTC will have to be applied, according to which:

"2. If it is other information that contains personal data not included in article 23, access to the information can be given, with prior weighting of the public interest in disclosure and the rights of the affected persons. To carry out this weighting, the following circumstances must be taken into account, among others: a) The elapsed time.

b) The purpose of the access, especially if it has a historical, statistical or scientific purpose, and the guarantees offered. c) The fact that it is data relating to minors. d) The fact that it may affect the safety of people. (...).”

Thus, access to the requested personal information goes through a prior, reasoned weighting between the public interest in disclosure and the rights of the people affected.

Before that, however, it should be noted that the person who submits the request for access to the City Council does so in the name and representation of a Trade Union Section that has a trade union delegate at the City Council. This question is relevant, given that the boards or staff delegates (art. 39 of the Royal Legislative Decree 5/2015, of October 30, which approves the revised text of the Law of the Basic Statute of public employee, hereinafter TRLEBEP), as well as the Company Committee (art. 63 of the revised text of the Workers' Statute, approved by royal legislative decree 2/2015, of 23 October, hereinafter ET), are the specific bodies representing civil servants and public workers with employment contracts respectively, and as such, exercise the functions granted to them by the corresponding regulations (art. 40 TRLEBEP and 64 ET), among others, the function of monitoring the compliance with current regulations.

Having made this consideration, as can be seen from the terms in which the access request is formulated, what is requested is information on the overtime hours worked, regardless of whether they have been compensated with remuneration or through compensation for hours .

The overtime hours, associated with each specific worker in a specific time period (year 2018) that have been paid gives us information that is part of the complementary remunerations that are essentially linked not to the workplace but to the individual who occupies it , and must correspond to the amounts set by each administration with the corresponding regulatory limitations. It should be noted that the specific amount received by each worker for this concept is not part of the job ratio (RLT).

Having said that, it is worth remembering the provisions regarding active advertising established for remuneration in article 11.1 of the LTC. According to this precept, the remuneration received by senior local officials must be published on the portal individually for each job and for any type of remuneration, compensation or allowance. Regarding this, article 4.2.b) of Law 19/2014 provides that, for the purposes of what is established in the law, they are considered high-ranking officials, in the service of the local administration, "the local representatives and the holders of superior and managerial bodies, in accordance with what is established by local regime legislati

This must lead to recognizing the right of access to the remuneration information of these senior positions, including overtime hours worked. This same criterion can be extended with respect to access to the remuneration of personnel who occupy positions of trust, of special responsibility within the organization, of free appointment, or which entail a high level of remuneration.

Thus, although in these cases the law does not provide for the publication of their remuneration on the Transparency Portal, with regard to requests for access to this information, it must be borne in mind that these are sites that their uniqueness and also because of the level of remuneration they

associate, the knowledge of their remuneration can be relevant for the control of the use of public resources. In these cases, it would be justified to provide individualized remuneration information, even identifying the people affected, and which could include overtime hours worked.

With regard to the rest of the workers, this Authority has maintained that, in accordance with transparency legislation, information on remuneration must be published in an aggregated manner, that is to say, associated with the jobs of the Administration public in question grouped according to the levels and the bodies to which they belong, without, in this sense, having to indicate the identity of the specific person who occupies a certain job.

The request for access does not specify a specific purpose of the access, but is limited to pointing out that it is necessary information "to carry out our duties as a trade union section and making use of our right of access to information" .

Article 40.1.a) of the EBEP, provides that the Personnel Boards and the Personnel Delegates must receive information on the personnel policy, as well as on the data relating to the evolution of remuneration, probable evolution of employment in the corresponding field, and on performance improvement programs. With regard to the workforce, article 64 of the ET establishes that the Works Council has the right to be informed about the issues that may affect the workers, and about the situation of the company and the evolution of the 'occupation of this, among others. However, neither article 40 EBEP nor article 64 ET foresees that union representatives must be provided with information on the overtime hours worked by each worker.

To carry out the functions of monitoring compliance with current regulations, it may be necessary to have an individualized list of overtime hours worked by workers. This would allow the workers' representative body to check the correct allocation of hours. However, this purpose can also be fulfilled without the need to sacrifice the privacy of the affected workers, because an individualized relationship can be facilitated, without including the identity of the workers.

It should be remembered that according to article 5.1 b) of the RGPD "the data will be adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed ("data minimization").

It must be taken into account that the disclosure of information on the income of a natural person facilitates the obtaining of an economic profile of the affected person which may end up causing him harm both in the professional field and in front of 'financial institutions, social etc. Although in this case the remuneration information would only refer to one of the wage supplements (overtime), the truth is that the claimant can obtain information on the base salary, and remuneration supplements of the jobs held by public employees, for example via publication of the RLT and the corresponding Budget Law or through the basic copy of the contract.

It must be remembered that in a case like the one we are dealing with, the purpose of the transparency regulations is not to control workers, but to control municipal action.

Therefore, in this case, the purpose of transparency can also be achieved by applying what is known in terms of the RGPD as pseudonymization: "the treatment of personal data in such a way that they can no longer be attributed to an interested party without using information additional, provided that said additional information appears separately and is subject to technical and organizational measures aimed at ensuring that personal data are not attributed to an identified or identifiable natural person;" (article 4.5 RGPD).

To this end, this Authority considers that, as it has maintained on other occasions, the list with the overtime hours worked by each worker could be facilitated, replacing their first and last names with a code assigned to each of them, such in a way that allowed to see and control the distribution of these hours among the collective of workers grouped by professional categories. It should be noted that this can be carried out if it is a question of council jobs that have a sufficiently large number of workers, in such a way that identifying each worker requires disproportionate deadlines or activities (otherwise, it can be grouped workers, in groups sufficient to achieve this objective).

In order for these codes to be effective from a data protection perspective, it is necessary to ensure that the identity of the worker is known only to the person who attributes the code, so that the worker is not identifiable by any other person, among others, by the representatives of the workers who will receive this information. So, for example, use the no. of ID or another code that can be known by third parties would not be a good option.

The code should remain in the communication made in this regard to the claimant, for the purposes of being able to see the accumulation of overtime hours assigned to each of them, but it should only be used for monitoring of the performance of overtime hours, and not for any other information other than this specific treatment, since, if it were to be used in a general manner for all actions carried out in the worker's work area, it would be easy for the crossing various data that the works council could obtain, made their identification possible and would end up having the same result as identifying working people with their ID number.

These considerations can also be extended to information on overtime that has not been paid, but compensated in hours.

From all the above, it is considered that the option of providing a list of overtime hours together with a numerical code in place of the first and last names of the workers (except for the high positions and other similar positions to which we have referred) would be the most suitable, in order to find in this case the right balance between the right to the protection of personal data of the affected workers and the right of access to public information of the applicant.

IV

It should be noted that some regulatory changes have recently taken place that may force this criterion to be modified in other requests that may be raised in the future in relation to the City Council's workforce. We are referring to the amendment of article 34 of the ET, to which a section 9 has been added through Decree-Law 8/2019, of March 8, on urgent social protection measures and the fight against precariousness labor during the working day.

According to this new section 9 of article 34 ET:

"9. The company will guarantee the daily work register, which must include the specific start and end time of each worker's working day, without prejudice to the flexible hours established in this article.

Through collective bargaining or company agreement or, failing that, the employer's decision prior to consultation with the legal representatives of the workers in the company, this day record will be organized and documented.

The company will keep the records referred to in this provision for four years and they will remain at the disposal of the workers, their legal representatives and the Labor and Social Security Inspectorate."

Taking these provisions into account, workers' representatives must have access to the register of overtime hours, and access to the register would also include the identity of the affected workers.

However, it must be taken into account, on the one hand, that the application of this access regime has only been established with respect to labor personnel subject to the ET; on the other hand, it should be borne in mind that this provision came into force on May 12, 2019 (fourth section of the sixth final provision of Decree-Law 8/2019), without having no type of retroactivity of the measure is foreseen, so it will be applicable only to the data of overtime worked from May 12, 2019.

Conclusions

The data protection regulations would not prevent the claimant's access to the list of overtime hours worked by the elected officials, senior officials and managers of the corporation and the rest of the staff who occupy positions of trust, of free appointment, of special responsibility within the organization or that involve high levels of remuneration.

As for the rest of the workers, the data protection regulations would not prevent access to the list of overtime hours worked during the requested time period, as long as this information is provided by replacing the first and last names of the working people by a code that does not allow them to be identified.

Barcelona, May 29, 2019