

Ref.: IAI 35/2019

**Claim: 237/2019**

**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 department for the denial of access to a file of reserved information.**

**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 237/2019 presented by a citizen against a department for the denial of 'access to a file of reserved information.**

**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 December 28, 2018, a person, an employee of the body of industrial technical engineers of the Generalitat, submitted a letter to a department in which he stated:**

- That by resolution of the Secretary General of the Department, dated June 19, 2018, it was agreed to open confidential information prior to a disciplinary file.**
- That on October 31, 2018, he was notified of the decision to close the reserved information and the agreement not to initiate disciplinary proceedings.**
- That as an interested party, and in accordance with the provisions of article 53.1.a) of Law 39/2015, he has the right to know at any time the status of the procedure and also to access and obtain copy of the documents contained in this procedure.**
- That both the jurisprudence and the GAIP itself recognize in several resolutions the right of access when the file has been resolved.**

**For all this, he requests access to the documentation contained in the aforementioned reserved information.**

**2. On January 31, 2019, the Department informs the interested party that their request is being analyzed, bearing in mind that since it is a completed file, the regulatory framework of reference is the legislation of transparency and the limits derived from the personal data protection regulations.**

**3. On March 4, 2019, the interested party sends a new letter to the Department in which he insists that the requested documentation be provided to him as soon as possible, and by virtue of his status as an interested person.**

**4. On March 26, 2019, the Department informs the interested party that their request can only be partially accepted, giving them access to the General Secretary's resolutions for the**

in which the opening and closing of reserved information are agreed, as well as their statements of June 28 and 29, 2018.

As for the rest of the documents in the file, access is denied under the protection of article 21.1.b) of Law 19/2014. The Department bases its decision on the fact that in recent months it has become aware of the existence of procedures in the investigation phase regarding facts and behavior predictably related to the documentation that integrates the aforementioned reserved information.

5. On April 8, 2019, the applicant filed a claim with the GAIP against the Department for the partial rejection of access to the file documentation.

In the claim, the interested party states that the Department does not justify how the denied information can harm the investigation of another administrative procedure over which the Department has no authority. It considers that the mere reference to the existence of an investigation should not imply a restriction of the right of access, without having justified the extent to which the investigation may be affected by this access. He also understands that the deadline to resolve has passed, and that his request must be considered silent.

6. On June 20, 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. Article 4.1 of 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 the concept of personal data as "all information about a natural person

identified or identifiable ("the interested party")" and considers as 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 said person."

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

This claim is filed against the partial denial of access to the information and/or documentation that makes up the reserved information prior to the start of a disciplinary procedure, initiated as a result of the denunciation of certain facts and/or irregular conduct attributed to an official who turns out to be the person making the claim.

Article 18 of Law 19/2014 (hereafter LTC), establishes that "people have the right to access public information, referred to in article 2.b, individually or on behalf of representation of any legally constituted legal person" (section 1).

Article 2.b) LTC defines "public information" as "the information prepared by the Administration and that which it has in its possession 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".

State Law 19/2013 is pronounced in similar terms in its articles 12 (right of access to public information) and 13 (public information).

The information and/or documentation that makes up this file is "public information" for the purposes of article 2.b) of the LTC, 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 e

Specifically, within the list of documents that have been provided by the Department, there is the complaint report (divided into two parts) of facts and/or irregular conduct attributed to the

claimant and attached documentation that accompanies it, the resolutions of June 19 and October 18, 2018 by which the start and end of the actions are agreed, the final report of conclusions prior to the resolution, and the different acts of declaration of the people questioned during the investigation.

Considering that the Department would have already provided the claimant with access to the two resolutions of initiation and termination of the reserved information, as well as the copy of the declaration acts of the same claimant, this report will focus on the rest of the documentation to which access has not been given and in the possible limitations that may arise with regard to the right to the protection of personal data.

Having said that, the documents that have not been provided to the claimant show the existence of personal information referring to the same person requesting access (employee who was reported), as well as personal information of third parties persons, among which would be included, the identification data of the persons in charge of carrying out the investigation actions, the personal data of the worker who made the complaint against the claimant, the data of the people who have given a statement (the most workers from the same work centre), and other data of people identified in the file documentation.

### III

With regard to the information contained in the file referring to the person making the claim, it is necessary to take into account the right of access that article 15 of the RGPD recognizes to the owner of the data:

"1. The interested party will have the right to obtain from the person in charge of the treatment confirmation of whether or not personal data that concern them are being processed and, in such case, the right to access the personal data and the following information: a) the purposes of the treatment; b) the categories of personal data in question; c) the recipients or the categories of recipients to whom the personal data was communicated or will be communicated, in particular recipients in third parties or international organizations; d) if possible, the expected period of personal data conservation or, if not possible, the criteria used to determine this period; e) the existence of the right to request from the person in charge the rectification or suppression of personal data or the limitation of the treatment of personal data relating to the interested party, or to oppose said treatment; f) the right to present a claim before a control authority; g) when the personal data has not been obtained from the interested party, any available information about its origin; h) the existence of automated decisions, including profiling, referred to in article 22, sections 1 and 4, and, at least in such cases, significant information about the logic applied, as well as the importance and expected consequences of said treatment for the interested party. 2. (...)

**3. The person responsible for the treatment will provide a copy of the personal data subject to treatment. The person in charge may charge a reasonable fee based on administrative costs for any other copy requested by the interested party. When the interested party presents the request by electronic means, and unless he requests that it be provided in another way, the information will be provided in a commonly used electronic format.**

**4. The right to obtain a copy mentioned in section 3 will not negatively affect the rights and freedoms of others.”**

**This precept recognizes the right of the person affected or interested (natural person owner of the data that is the subject of the treatment) to request and obtain from the person in charge of the treatment a copy of their personal data subjected to treatment, including the information on the origin of the data when these have not been obtained from the same interested person.**

**However, this right is not absolute and may be limited in accordance with the provisions of article 23 GDPR:**

**"1. The Law of the Union or of the Member States that applies to the person responsible or the person in charge of the treatment may limit, through legislative measures, the scope of the obligations and the rights established in articles 12 to 22 and article 34, as well as in article 5 to the extent that its provisions correspond to the rights and obligations contemplated in articles 12 to 22, when such limitation essentially respects fundamental rights and freedoms and is a necessary and proportionate measure in a society democratic to safeguard: a) the security of the State; b) the defense; c) public security; d) the prevention, investigation, detection or prosecution of criminal offenses or the execution of criminal sanctions, including the protection against threats to public security and their prevention; e) other important objectives of general public interest of the Union or of a Member State, in particular an important economic or financial interest of the Union or of a Member State, including in the fiscal, budgetary and monetary areas, public health and social Security; f) the protection of judicial independence and judicial procedures; g) the prevention, investigation, detection and prosecution of violations of deontological norms in the regulated professions; h) a function of supervision, inspection or regulation linked, even occasionally, with the exercise of public authority in the cases contemplated in letters a) ae) and g); i) the protection of the interested party or the rights and freedoms of others; j) the execution of civil demands. (...)"**

**The Department, in the letter of March 25, 2019, in response to the request, justifies the denial of access to part of the documentation of the file on the fact that "in recent months there has been knowledge to the General Secretariat of the existence of procedures in the investigation phase on facts and behavior predictably related to the documentation that**

integrates the Reserved Information", and in this sense, it considers that the limitation of article 21.1.b) of the LTC applies.

It is a consolidated jurisprudential criterion that the investigation phase prior to the start of a sanctioning or disciplinary procedure does not properly constitute an administrative procedure (among others, STSJM 471/2006, of May 24), as well as that its reserved nature prevents access to its content from being facilitated during its processing, given that knowledge of it may lead to a clear detriment to the result of the same (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)).

Thus, the claimant's right of access to their data (Article 15 of the RGPD) could be limited during the investigation and whenever it is considered that it may prejudice the investigation of conduct that could be sanctioned administratively or even criminally (limitation provided for in article 23.1 d) of the RGPD). This limitation would affect any person affected by the actions, regardless of the position they hold.

In this case, however, the reserved information object of access has ended, and in accordance with the complementary report of the Department, of June 13, 2019, issued in relation to this claim, the investigative actions to which it was referenced by the Department in its resolution on the request for access presented by the claimant and which would have motivated the restriction, would also be closed, with the imposition of structural and training corrective measures.

Based on this premise, it does not seem that a limitation on the claimant's right of access (Article 15 RGPD) to the information that refers to his person and that is contained in the requested documentation can be justified.

In this sense, the person who exercises the right of access (the reported worker) would have the right to know, not only the direct information about him that the Department is dealing with, but also the origin of the information and any communications that have been done or are expected to be done, and the other aspects provided for in article 15 RGPD.

Taking this into account, and the view of the information contained in the reference file, the claimant should be able to access not only the identifying, employment or other similar data contained in the documents that have already been delivered to him (resolutions of 'beginning and closing and own statements), but also to the information referring to the facts, conduct, or attitudes attributed to him in the report-complaint, and other attached documentation (e-mails where the claimant is the issuer or the sole recipient of the information, e-mails where the content of the information refers to facts or conduct of the claimant, or minutes of work meetings where their statements are collected, etc.).

Warn that the data of people (workers or not) identified by the complainant in the description of facts, manifestations or conduct that she attributes to the complainant, (considering them victims of disrespect, or inappropriate treatment of any citizen or foreign person to the Administration, it is part of these facts or conduct, and therefore, it is personal information

of the claimant, to which he has the right to access, under the terms of Article 15 RGPD, given that it does not appear that any of the assumptions that would allow access to be limited under the terms provided for in Article 23 RGPD can be met.

You also have the right to access the information that may be recorded about you in the various acts of declarations made by the person making the complaint or the other people who have intervened as witnesses in the course of the investigation.

Warn, however, that the facts, behaviors or attitudes described, which are sometimes related to appreciations or opinions of the reporting person or to the consequences that this produces on their state of mind, psychological or physical, are information from third parties that will be analyzed in the following legal basis, but we already advance that it should be possible to remove from the set of information contained in the document that referred to the accused.

The data owner's right of access (Article 15 RGPD) also includes the right to know the origin of the data being processed, and therefore the identity of the reporting person or other workers who provide information about the accused.

With regard to the identity of the person making the complaint, it is worth saying at the outset that this person appears identified in the decision to terminate the reserved information that would have already been provided to the complainant, and would already be known to him (a fact that follows of the claimant's letter of December 28, 2018), with which the pronouncement that is adopted in the resolution of the claim, would in no case prevent this communication from occurring.

It is contained in the written file of the complainant in which he expresses his opposition to the complainant's access to his statement, considering that it would involve the violation of his privacy. It highlights the fact that prior to giving a statement, she was informed that the information provided was of a confidential nature and to which the interested parties would only have partial access in the event that any disciplinary proceedings were to result from it.

Specify that the person who submits a complaint against another worker for facts or conduct related to him, should provide that the person complained of can know the facts or situations that are part of the story in which the accusations made against him are sustained, in effects that can counter them and defend themselves.

The impact on the privacy of the reporting person could be appreciable with respect to information that this person had made about himself, but not with regard to the information provided on facts or conduct attributed to the claimant, it has been instructed disciplinary file or not, and in this sense, the complainant's right to data protection should not be a limitation to the claimant's right of access to his data collected in the complaint and attached documentation, as well as in the declaration of subsequent ratification.

Point out that article 24 of Organic Law 3/2018, of December 5, on the protection of personal data and guarantee of digital rights (hereinafter LOPDGDD) contemplates the possibility of preserving the identity of the complainant (limiting the right of access to the source of the data itself) in the event that the Administration creates internal whistleblowing information systems, as a mechanism to protect whistleblowers. This forecast is not applicable to the case at hand, not only for temporary reasons, but because the creation

and operation of these systems requires that employees be informed of their existence, which does not appear to have occurred.

The claimant would also have the right to access the information relating to his person that appears in the statements of the other workers summoned to testify as witnesses. In principle, you could also have the right to know the identity of these people, given that this is part of the origin of your data. However, this right may come into conflict with the right to data protection of the affected workers.

Certainly, the reserved nature of this type of investigation means that the workers who declare or provide information about this type of investigation do so in the confidence that, without prejudice to the access necessary to guarantee the right of defense of the people responsible, their identity is preserved.

In this case, sixteen workers or former workers of the work center where the claimant provides services (leaving aside the complainant and the accused) have given statements. These are people from the same work environment, most of them co-workers of the claimant, and the disclosure of what they can say or not say regarding the facts attributed to the claimant could end up negatively affecting the labor relations of these workers. Hence the special relevance it has in these cases, to comply with the hearing procedure provided for in article 31 of the LTC, and to know if there are personal circumstances or reasons that would justify preserving their identity.

The Department states in the supplementary report of June 13, 2019, that on June 6 and 7, 2019, at the request of the GAIP, it forwarded the request for access to the potentially affected persons, so that they could make the allegations they considered appropriate, for the purposes of the provisions of article 31 of the LTC.

The file contains the writings of 7 people who are opposed to the claimant being able to access their respective statements. All of them consider that access would be a violation of their privacy, and base their opposition on the fact that at the time of giving a statement, they were told that the information provided was confidential and to which they would only have partial access those interested in cases where the instruction of any disciplinary file is derived from it. However, no concrete circumstances are alleged that would allow a clear prejudice to be appreciated due to the fact that the claimant can access his identity.

For all this, it does not seem that the claimant's right to access all the information that appears about him in the information provided or generated in the course of the investigation, including the origin and therefore the identity of the people who have provided said information as part of the investigation.

#### IV

Regarding access to other personal data of third parties, and beyond the data we have referred to in the previous legal basis, the criteria provided for in articles 23 and 24 of the LTC must be applied.



Thus, in accordance with article 23 of the LTC "requests for access to public information must be denied if the information sought contains particularly protected personal data, such as those relating to the ideology, trade union membership, religion, beliefs, racial origin, health and sex life, and also those relating to the commission of criminal or administrative offenses that do not entail a public reprimand to the offender, unless the person affected expressly consents to it in writing that must accompany the request."

For its part, article 15.1 of Law 19/2013 establishes that "(...) If the information includes specially protected data referred to in section 3 of article 7 of Organic Law 15/1999, of December 13, or data relating to the commission of criminal or administrative offenses that did not entail a public reprimand to the offender, access may only be authorized if the express consent of the affected person is obtained or if the latter is protected by a law with the rank of Ley."

These precepts limit access to data relating to physical or mental health or any other information deserving of special protection, such as that relating to the commission of criminal, administrative or disciplinary offences. Therefore, any information that may be contained in the reference file that is of this nature must be limited given the terms provided for in the transparency legislation. This would include, for example, the references to the state of health of the reporting person contained in the report, or the data related to the occupational risk assessment of a worker at the center that appears in the e-mails of document no. 9 that accompanies the complaint report.

With regard to the information about employees or public positions that may be included in the file, article 24.1 of the LTC provides that "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". In principle, according to this precept there should be no inconvenience in providing the claimant with the merely identifying data (name and surname and position) of the persons responsible for the processing of the reserved information.

Beyond this, access to the rest of personal information of third parties requires a reasoned weighting between the various rights and interests at stake, in accordance with article 24.2 of the LTC:

"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."

The claimant requests, as can be seen from the initial request for information, dated October 28, 2018, the documentation of the file on the understanding that he is an interested person, and that as a defendant, he must be recognized the right of access to his own data, and to provide him, in any case, with information relating to his person (facts, verbal expressions, conduct attributed to him or infractions of which he is accused) as an element essential to exercise your right of defence.

Subsequently, by means of a letter sent to the GAIP of May 21, 2019, he insists on the fact that he is the affected person in the reserved information that is the object of the claim, given that it was initiated by accusation of an alleged psychosocial risk that he would have caused in the health of some people in the service in which he works. He considers that although the withheld information did not lead to a disciplinary case against him, the fact that he did not provide the requested information in time prevented him from being able to provide it in another investigation for workplace harassment that was subsequently opened against him, to demonstrate the falsehoods that, in his opinion, were argued, causing him to be defenseless. It also points to the fact that in the reserved information, serious and very serious administrative breaches were highlighted, on which an investigation was requested, without result. Although it indicates that this investigation would have ended, without any signs of harassment, it adds to the psychological pressure suffered by the possibility of h

Ultimately, everything points to the claimant's interest in obtaining information about what has been said about him and who said it, when he feels harmed. The fact that this interest was initially motivated by the need to provide documentation to another investigation to prove accusations that he considered false and that this file has been closed without any signs of harassment, does not remove the fact that the interested party can subsequently exercise the legal actions it deems appropriate to defend itself against said accusations.

There is also the circumstance that, as indicated in the Department's complementary report of June 13, 2019, an organizational analysis of the administrative unit has resulted in the non-renewal of the claimant's service commission and subsequent deletion of the workplace he occupied for having lost its content. Thus, although the actions carried out have not resulted in the opening of a disciplinary file against the claimant, the truth is that the result of the reorganization of tasks carried out as a result of the deficiencies detected in the reserved information, has harmed the claiming, with the non-renewal of the service commission and subsequent amortization of the position it occupied.

Be that as it may, it does not seem that, a priori, the claimant's access to third party information beyond that referred to these facts or own conduct to which we have already referred in the previous legal basis, for the purposes that this can verify the specific facts or behaviors attributed to him and evaluate the exercise of the legal actions he considers appropriate.

Thus, for example, it would be necessary to limit access to the statements, opinions or explanations made by the different people who have declared as witnesses referring to their own employment situation, or to facts or conduct referred to their boss (person reporting).

The principle of data minimization requires that any data processing carried out (such as data communication or access) is limited to the minimum data necessary to achieve the intended purpose of this processing (Article 5.1.c ) GDPR).

This and the expectations of privacy with which the affected persons act in the face of actions that collect confidential information, leads us to conclude that it is necessary to prevail in this case the right to data protection of these persons and limit, therefore , the claimant's access to said information. For all that, it would be necessary to prevail, with respect to this type of information, to the right to data protection of these people, and to limit their access.

Neither would the claimant's access to e-mail communications between third parties be justified, unless the information it contains refers to the claimant himself.

With regard to e-mails addressed by the boss where instructions are given or information is given about tasks carried out or to be carried out within the organization, and in which several people are identified together with the claimant as recipients of said information , point out that although the information may be relevant for the purposes of achieving the intended purpose, it does not appear that the claimant's access to the identification data of the other recipients can contribute anything to these purposes. If this is the case, it would be necessary to remove the first and last names or, if applicable, the email addresses of the other recipients prior to access. This measure would be more respectful of the principle of data minimization, despite being aware that when dealing with people who work in the same unit it is relatively easy for the claimant to identify them by the context of the situation described or by other means indirect

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Point out that the limitation of access to the personal information of affected third parties that may be included in the file documentation, does not prevent the claimant from being able to provide access to the requested information that is not affected by the application of this limit.

Article 25.1 of the LTC establishes, in this sense, that "if any of the access limits to public information established by the previous articles are applicable, the denial of access only affects the corresponding part of the documentation, and must authorize restricted access to the rest of t

Finally, remember that according to article 35.2 of the LTC "the right of access cannot be acquired by administrative silence if any of the limits established by this or other laws to have access to public information are met."

**conclusion**

In accordance with article 15 of the RGPD, the person making the claim has the right to access all the information about him/her that appears in the information provided or generated in the cou

**actions of the reserved information already completed, including the origin or identity of the people who would have provided said information.**

**On the other hand, access to the rest of the personal information on third parties that may appear in the file, beyond the mere identification data of the people responsible for processing the reserved information requested, does not seem to be justified .**

**Barcelona, July 16, 2019**

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