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Ref.: IAI 43/2019

Legal report issued at the request of the Commission for the Guarantee of the Right of Access to Information Public on the claim presented against the refusal by a Provincial Council of the request for access to the nominal list of persons released from union

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 the claim submitted in relation to the refusal by a Provincial Government of the request of access to the nominal list of people released from union.

Having analyzed the request, which is accompanied by a copy of the file of the claim submitted, in accordance with the report of the Legal Counsel I issue the following report:

Background

1. On April 26, 2019, an official of a County Council submits a letter to the County Council in which he requests the names of the persons released for the performance of union functions.

2. On June 19, 2019, the Provincial Council notifies the person claiming the decree by which access to the requested information is denied. The refusal is based on the fact that the information about which access is requested contains specially protected data, without the affected parties having made it manifestly public before the access was requested or having expressly consented through an accompanying letter to the request, nor subsequently to the complaints procedure (in which they have expressed their opposition to the transfer of their data).

3. On June 21, the interested party filed a complaint with the GAIP against the refusal by the Provincial Government to access the identification of the released persons. The claim is based on the following allegations:

a) It specifies that only the data of the workers' representatives are requested and it states that the main purpose of knowing the first and last names of the freed trade unionists is not to identify the trade union affiliation since, in advance, the trade unions and the people who have was part of the nominations of those who make up the Personnel Board, they made them public and everyone knows the unions they belong to. b) The denial of access would prevent the workers who elected their representatives, to know who enjoys this release. c) Article 9.1 i) of Law 19/2014, includes agreements, agreements and pacts of an official, labor and union nature, within the information relating to the organization that the Administration must make public.

d) Article 15.1 of Law 19/2103, state law, indicates that access can only be authorized in the event that the express and written consent of the affected person is obtained, unless the latter has clearly made the data public before that access was requested and include in the letter the images of the trade union information relating to the candidatures for the trade union elections

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of the different trade unions, which contain the names and surnames of the candidates, and in the case of a trade union, also their photograph.

e) He states that knowing this information will allow all workers to be able to evaluate the dedication of these people in the run-up to the next election, and that hiding this information is contrary to transparency. f) For this reason, it requests the agreement or agreements in which the Administration and the unions have agreed on the release of the people, and if the agreements do not include the name, the nominal relationship of the people who enjoy 'this liberation.

4. On July 1, 2019, the GAIP requests a report from the County Council in relation to the claim presented.

5. On July 22, 2019, the GAIP sent this Authority the file relating to the claim and requested a report in relation to the claim presented. The file contains the report of the Provincial Council and the documentation relating to the process of complaints to the interested parties.

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 contained in the requested information is outside the scope of this report, as would be the case of the limit established in article 21 of Law 19/ 2014, of December 29, on transparency, access to public information and good governance.

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.

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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), defines personal data as "all information about an identified or identifiable natural person ("the interested party"); Any person whose identity can be determined, directly or indirectly, in particular by means of an identifier, such as a number, an identification number, location data, an online identifier or one or more elements of identity, shall be considered an identifiable physical person physical, physiological, genetic, psychological, economic, cultural or social of said person; ".

In accordance with the definition of treatment in article 4.2 of the RGPD "consultation, use, communication by transmission, dissemination or any other form of enabling access, access or interconnection, limitation, deletion or destruction " of personal data, are data treatments subject to the principles and guarantees of the RGPD. Therefore, the communication of personal data by the Provincial Government, as a result of the request made by the person now claiming, is data processing under the terms of the RGPD.

The RGPD provides that all processing of personal data must be lawful, loyal and transparent in relation to the interested party (Article 5.1.a)) and, in this sense, establishes a system of legitimizing the processing of data which is based on the need for one of the legal bases established in its article 6.1 to apply. Specifically, sections c) and e) of article 6.1 of the RGPD provide respectively, that the treatment will be lawful if "it is necessary for the fulfillment of a legal obligation applicable to the person responsible for the treatment", or 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".

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

At the same time, article 86 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 of 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."

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In view of this, Law 19/2014, of December 29, on transparency, access to public information and good governance (LTC hereafter) aims, among others, to "regulate and guarantee the right of access of people to public information and documentation" (art. 1.1.b).

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".

The information that is the subject of the claim submitted by an official of a Provincial Government is "public information" for the purposes of the LTC and would remain subject to the access regime provided for in this regulation. Consequently, from the point of view of the right to the protection of personal data, the communication of this information that contains personal data can be considered a lawful treatment covered by letter c) of article 6.1 of the RGPD, always that it complies with the transparency legislation and the rest of the principles and guarantees of the RGPD.

III

In accordance with article 20 et seq. of the LTC, the right of access to public information may be denied or restricted for the reasons expressly established in the laws. Specifically and with regard to information that contains personal data, it is necessary to assess, in application of the regime provided for in articles 23 and 24 of the LTC, whether or not the right to data protection of the affected persons would justify the limitation of the right of access to the information subject of the request.

Article 23 states that requests for access to public information must be denied if the information to which access is sought contains "specially protected data, such as those relating to ideology, trade union affiliation, the religion, beliefs, racial origin, health and sex life, and also those relating to the commission of criminal or administrative offenses that do not entail a public reprimand to the offender, unless the affected party expressly consents through of a letter that must accompany the request".

In the event that the information to which you want to access does not contain specially protected data, article 24 of the LTC establishes:

"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.

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

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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.

3. Requests for access to public information that refer only to the applicant's personal data must be resolved in accordance with the regulation of the right of access established by the data protection legislation staff."

IV

In the case at hand, in the request submitted by an official of the County Council, "the nominal list of the fifteen released persons" (union workers) of the County Council is requested.

It must be taken into consideration that the Provincial Council, in accordance with what is established in article 9.2 of the LTC, must make public on its transparency portal, within the information relating to the organization, the number of union workers with the indication of the unions to which they correspond and the costs that these releases generate.

The identification with the first and last names of the freed workers, subject of the consultation, could allow to know, without disproportionate efforts with the information that is already the subject of active advertising (the website specifies the total number of freed people and the number of these from each union), to which union the affected persons are affiliated and therefore data considered particularly protected under the terms of article 23 of the LTC.

The RGPD prohibits in article 9.1 the processing of personal data that reveals ethnic or racial origin, political opinions, religious or philosophical convictions or trade union affiliation, and the processing of genetic data, biometric data intended to identify unequivocally a natural person, data relating to health or data relating to the sexual life or sexual orientation of a natural person, except when one of the causes provided for in the second section of this article occurs, among which .

"a) The interested party has given their explicit consent to the processing of these personal data for one or more of the specified purposes, unless the law of the Union or of the member states establishes that the interested party cannot lift the prohibition mentioned in section 1. (...)e) The treatment refers to personal data that the interested party has made manifestly public."

Taking into account that in this case the consent of the affected persons is not counted, it will be necessary to assess whether we are in a case in which the interested party has clearly made the data public prior to the access request.

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v

To determine whether the circumstance provided for in letter e) of article 9.2 of the RGPD ("the treatment refers to data that the interested party has made manifestly public") is present, it is necessary to know the cases in which public workers can enjoy union hours.

For this purpose, it is necessary to start from the Organic Law 11/1985, of August 2, on Freedom of Association (LOLS) which recognizes the right of workers to trade union activity (article 21.e) and the civil service regulations.

Article 39 of Royal Legislative Decree 5/2015, of October 30, approving the revised text of the Law on the basic statute of the public employee (EBEP), establishes that the specific bodies of representation of the officials are the staff delegates and the staff boards (the staff delegates are the representative bodies in the electoral units where the number of officials is equal to or greater than 6 and less than 50 and, if it is greater than 50, the bodies of representation are the staff meetings).

Article 41 of the EBEP establishes that the members of staff boards and staff delegates, if applicable, as legal representatives of workers are entitled to a credit of monthly hours within the working day and remunerated as effective work, in accordance with the number of officials they represent (on a scale ranging from 15 to 40 hours per month per member of the staff board or staff delegate) and, likewise, that those who are the candidacy itself has the possibility of accumulating hourly credits, if they so express, with prior communication to the personnel management. All this without prejudice to the fact that this matter can be the subject of an agreement with the unions.

On the other hand, article 8.1 a) of the LOLS recognizes the right of workers affiliated to a trade union to form trade union sections within the company or workplace, and article 10 of the LOLS regulates the designation of Trade Union Delegates as representatives of trade union sections.

With regard to Trade Union Delegates, section 3 of article 10 of the LOLS establishes that "in the event that they are not part of the works committee, they have the same guarantees as those legally established for the members of the works committees company or representative bodies established in public administrations.

The LOLS also provides that union representatives who participate in the negotiating commissions of collective agreements have the right to "the granting of the paid leave necessary to carry out their work as negotiators" (article 9.2 of the LOLS).

Also, through negotiation between the relevant administration and the union organizations, pacts can be agreed on the number of representatives and the allocation and distribution of union credit hours, in which the allocation of hourly credits could be agreed , in addition to the members of staff boards, staff delegates and trade union delegates, to other public employees designated by trade union organizations in order to engage in the activity derived from trade union action.

Therefore, from the regulations in force and the corresponding union agreements, it follows that the members of the personnel board, the delegates of

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staff, trade union delegates, as well as public employees who enjoy an institutional trade union license or those to whom the trade union grants them in order to dedicate them to the activity derived from trade union action.

In accordance with the fifteenth additional provision of the EBEP, the information on "hourly credits, their cessions and trade union releases that derive from the application of rules or agreements that affect the obligation or the work assistance regime" is must enter in the Register of Personnel Representation Bodies that all public administrations must have.

It is therefore appropriate to analyze whether it is possible to facilitate the identification of the persons released in each of these situations.

VI

We can advance that the members of the staff board and staff delegates, as well as the union delegates, would have made public their membership or affiliation with a certain union as a result of the procedure for their election as a representative of the workers or of the unions and, as a result of the exercise of their functions.

Thus, with regard to the procedure for the election of members of staff boards and staff delegates, Law 9/1987, of June 12, on representation, working conditions and staff participation of the administration, which although largely repealed by the EBEP, certain precepts remain in force, in the nature of basic regulations, until the general electoral procedure is determined.

As for what is of interest now, the following follows from Law 9/1987: the most representative unions (with the corresponding specifications) and the officials of the electoral unit can promote elections to delegates and staff boards, by majority agreement (article 13); active officials can be electors and eligible (article 16.1); legally constituted trade union organizations or their coalitions can present candidates as well as candidacies endorsed by a certain number of signatures (article 17); the candidacies submitted must be published on the notice boards of all work centers (article 26.4); the counting of the votes in the trade union elections is public and a record is drawn up of the same which is published on the notice boards of all workplaces (article 27).

According to the information contained in the file, the intranet of the deputation publishes the result of the 2019 elections with the names of the elected representatives and the union to which they belong as well as the composition of the personnel board with the names of the representatives classified by their membership of the unions represented there, and the name of the employee representative.

Thus, the members of the personnel board and the personnel delegates would have made public, in the electoral process corresponding to their election and in the performance of their functions, their connection or membership to a specific union, in such a way that the circumstance that allows the prohibition of treatment to be lifted would occur when it refers to data that the interested party has made manifestly public (Article 9.2 e of the RGPD).

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In the case of trade union delegates, their election is carried out by members of a trade union within the company or workplace and among its members (article 10.1 of the LOLS). The LOLS recognizes the right to hold meetings, collect dues and distribute trade union information (article 8.1.b) and the same guarantees as members of the works committee or representative body in the field of public administrations. The union delegates are, therefore, representative positions of the workers. In this process, the people who have been chosen as trade union delegates, as a result of the exercise of the functions entrusted to them, have necessarily had to make public their membership of a certain trade union and this circumstance must be known in the 'work environment of these people. Therefore, in this case, the assumption of the article provided for in letter e) of article 9.2 of the RGPD would also apply.

Union freedmen who are public employees designated by unions to carry out union functions or to enjoy an institutional union license as a result of agreements or negotiations between the union do not necessarily have to have made their union membership public and the corresponding administration, if they have not participated in a union election process as a candidate in a union candidacy. However, the claimant specifies in the letter of claim, unlike the terms in which he formulates the request, that his request refers to the union representatives who are the workers' representatives.

VII

Access to the first and last names of public workers who have been designated as union freedmen, in their capacity as workers' representatives, would not incur the prohibition provided for in Article 23 LTC, insofar as these people would have already disclosed the their trade union affiliation previously in the corresponding electoral procedures.

However, given that what is requested is not only the connection with a certain union, but the condition of being released, it will be necessary to take into account article 24.2 of the LTC to carry out a reasoned weighting between the public interest in the disclosure of this information and the right of the persons concerned.

Although in accordance with article 18.2 of the LTC, the exercise of the right of access is not subject to motivation, the fact that the applicant expresses what is the purpose he pursues and, in short, the reasons for which it is interesting to know the information, adds a very important element to be taken into account to determine whether access can be granted, since the purpose, in accordance with article 24.2 b) LTC, is one of the weighting elements between the public interest in the disclosure of information and the right of the people affected.

In the case we are dealing with, the person requesting access is an official of the Provincial Government who states that the purpose of knowing the names and surnames of the freed trade unionists is to know who has been designated to exercise trade union functions in their capacity as representatives of the workers in order to be able to evaluate the dedication of these people in the face of the nex

In this sense, it cannot be denied that the hourly credits enjoyed by those freed from trade unions have an impact on the organization and operation of the workplaces where they carry out their duties. And, in the case of the workers' representatives, precisely to carry out the tasks of representation entrusted to them, transparency in their

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designation as union freed, allows the rest of the workers who have elected them to have the necessary elements to have knowledge and be able to evaluate the union activity developed, which.
In the end, it must result in a protection of the fundamental right to freedom of association.

On the other hand, the impact on the privacy of the people affected, by being able to know the timetable of their dedication to union activity and, consequently, the reduction of their working day in tasks specific to their workplace in the administration, would not be greater than that derived from the knowledge of the working hours of any public worker, which can be obtained from his (public) appointment and the publication of the working hours contained in the List of jobs.

In short, it does not seem that there will be a greater harm to their privacy due to the disclosure of the identification data of the names and surnames of the persons freed from trade unions who have the status of representatives of the workers and, on the other hand, their knowledge guarantees transparency and control over the application of union agreements by the rest of the workers.

Conclusions

The right to data protection does not prevent the person making the claim from providing the information on the name and surname of the workers' representatives who have been designated as union freedmen.

Barcelona September 10, 2019

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