

Ref.: IAI 44/2019

Legal report issued at the request of the Commission for the Guarantee of the Right of Access to Information Public on the claim submitted against the denial by a health consortium of access to the list of emeritus doctors and remuneration

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 denial by a health consortium of access to the list of emeritus doctors and remuneration.

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

Background

1. On May 28, 2019, a citizen requests the following information from a health consortium:

1. List of current emeritus doctors.
2. List of workers who meet compatibility criteria to work in the company public and private.
3. Annual remuneration of emeritus.
4. Extraordinary revenues from the radiotherapy service for non-care activity in the years 2017, 2018 and 2019.

2. On June 28, 2019, the Consortium decides to approve the request submitted in relation to the second section of the letter of request and reject the request with regard to the first and third sections, for contain personal data.

With regard to the fourth section, the interested party is informed that, unless there is an error, there is no extraordinary income for the Consortium derived from non-care activity of the Radiotherapy Service.

3. On July 15, 2019, the interested party filed a claim with the GAIP against the entity for the denial of information on the list of current emeritus doctors and their remuneration.

4. On July 19, 2019, the GAIP requests the Consortium for a report in relation to the claim presented.

5. On August 1, 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.

5. On August 7 and 9, 2019, the GAIP sent the Authority a letter of clarification on the claim submitted as well as the report issued by the claimed entity.

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.

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 27 April, 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 identifier

online or one or several elements of the physical, physiological, genetic, psychological, economic, cultural or social identity 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 Consortium, 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."

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 is "public information" for the purposes of the LTC and would remain subject to the access regime provided for in these regulations. Consequently, from the point of view of the right to the protection of personal data, the communication of this information can be considered a lawful treatment covered by letter c) of article 6.1 of the RGPD, as long as it is appropriate to what is established by the transparency legislation and the

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.

Given that the information that is affected by the access does not contain data considered to be particularly protected under the terms of article 23 of the LTC, it will be necessary to apply article 24.2 of the LTC according to which when "it is another information that contains personal data not included in article 23 can be given access to the information, 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:

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 alleges employment reasons for obtaining the information. Specifically, in a subsequent letter sent to the GAIP, he states that he is the secretary of the company's committee and that within the framework of the negotiation of the collective agreement and the pacts for partial retirement, it is important to obtain information on the amount of the salary mass that is allocated to emeritus doctors.

The Workers' Statute attributes to the works committee, as a representative and collegial body of all the company's workers (article 63.1 ET), certain functions for the exercise of which it recognizes the right to access to certain information that may contain personal data.

In this sense, article 64.1 ET provides that: "The works committee will have the right to be informed and consulted by the employer on those issues that may affect the workers, as well as on the situation of the company and the evolution of employment in the same, in the terms provided for in this article." Adding that information is understood as "the transmission of data by the employer to the works council, so that it is aware of a certain issue and can proceed to its examination." (...)

Beyond this generic clause, section 7 of this same precept attributes to the works committee, among others, the function "1º Of monitoring the fulfillment of the current rules in labor matters, of Social Security and employment, as well as the rest of the agreements, conditions and usages of the company in force, formulating, as the case may be, the appropriate legal actions before the employer and the competent bodies or courts."

In this context, and to the extent that the information requested about the entity's emeritus staff and their remuneration is necessary for the exercise of the functions attributed to the works committee, there should be no inconvenience when providing it to the claimant.

On the other hand, it is also necessary to take into account the provisions of the transparency legislation with regard to the remuneration data of the personnel in the service of the entities subject to the scope of application of the LTC.

Thus, article 11.1 of Law 19/2014 establishes that they must be made public:

"b) The remunerations, compensations and allowances, the activities and assets of the members of the Government, of the senior positions of the Public Administration and of the management staff of the public bodies, societies, foundations and consortia, and the compensations that have to be perceived when ceasing to exercise the position. (...)

e) The general information on the remuneration, compensation and per diems received by public employees, grouped according to the levels and bodies."

Therefore, the remuneration received by senior officials is the subject of active advertising, which must be published individually for each job and for any type of remuneration, compensation or allowance.

It is a criterion supported by this Authority that this can be extended with respect to personnel who occupy positions of trust, of special responsibility within the organization, of free appointment, or that involve a high level of remuneration. 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, due to their singularity and also due to the level of remuneration they usually bring associated, 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 about the positions, even, if necessary, identifying the people affected.

The figure of the emeritus staff of the health services is regulated in Law 55/2003, of 16 December, by which the Framework Statute of the statutory staff of the health services is approved. This rule foresees that the health services can appoint, exceptionally, emeritus personnel among retired licensed health personnel, based on the merits of their professional curriculum that must be previously assessed.

Decree 68/2005, of April 19, which establishes the requirements for recognition of the status of emeritus staff of ICS health institutions, develops Law 55/2003 and provides for the possibility of appointing emeritus staff in the case of certain professionals who have proven a particularly distinguished professional career. The decree foresees that the activity of this staff is circumscribed to the performance of functions of consultancy, advice, training and design of certain types of programs and projects, but in no case can they exercise healthcare.

The appointment as emeritus staff entails, in addition to a lifetime honorary recognition, that these professionals can maintain a link with the health institutions that allows them, for annual periods of time that can be extended and at most until the fulfillment of the age 72, an active and remunerated relationship compatible with the perception of the retirement benefits of the Social Security regimes, as established in article 77.3 of Law 55/2003, of December 16, in accordance with the which:

"The perception of retirement pension by a public Social Security regime will be compatible with the situation of emeritus personnel referred to in the fourth additional provision.

The remuneration of the emeritus staff, added to their retirement pension, cannot exceed the remuneration that the interested party received before his retirement, considered, all of them, in an annual calculation.

In accordance with this provision, Law 4/2017, of March 28, on the budgets of the Generalitat de Catalunya for 2017, in force as a result of the budget extension, establishes in article 25.4 the remuneration criteria in relation to the personnel who are in the situation provided for in Law 55/2003.

Despite being aware that the disclosure of a natural person's income facilitates the obtaining of an economic profile of the affected person, the situation of emeritus personnel is an exceptional situation that entails the compatibilization of the collection of the retirement pension that corresponds, with a remuneration as a result of the performance of certain functions established by the administration. This exceptional situation is regulated by the law that establishes a limitation to the income they can receive, and we understand that it would be comparable to that of personnel who occupy positions of trust within the organization, regarding which this Authority has already pronounced.

Taking this into account, in principle, there should be no problem, as has been pointed out, in handing over said information to a member of the works council for the purposes that, if necessary, he could perform a control function of public funds or surveillance of the applicable labor regulations, if, prior to the hearing procedure of the affected persons (art. 31 LTC), and as long as there are no personal circumstances that advise limiting access to said information.

It should be noted, however, that the principle of data minimization requires that any data processing carried out is limited to the minimum data necessary to achieve the intended purpose of this processing (Article 5.1.c) GDPR).

In this sense, and with respect to the list of current emeritus doctors that is requested, the interested party states that he wants to know if there are 5 or 50 doctors on the hospital's payroll, and points to the possibility of being provided with the initials of the first and last name, or the last three digits of the ID with the letter, as it seems the company would do on other occasions.

On the other hand, and with regard to the remuneration information, the claimant specifies that he is interested in knowing not only the overall cost of the wages of this staff, but also the total amount received by each of these people, proposing as an example that this list is made available to him, indicating the initials or three digits of the DNI and the letter with the annual amount received.

Certainly, if the reason for the request for information is, as the interested party points out, to know the global and individual cost that it means for the entity to maintain emeritus staff for the purposes of negotiating eventual agreements for the partial retirement of the rest of workers, it does not seem to be strictly necessary to obtain this list by identifying the people with their first and last names.

In these cases, you should opt for pseudonymization of the data, which in terms of article 4.5 of the new RGPD, consists in treating the personal data in such a way that those provided can no longer be attributed to the owner of the data without using additional information, provided that this additional information is recorded separately, and is subject to technical and organizational measures aimed at ensuring that the personal data is not attributed to an identified or identifiable natural person.

It is worth saying that replacing the first and last name with initials would not guarantee that the affected person cannot be identified without making disproportionate efforts, especially considering that they are people from the same work environment as the claimant. The three numbers of the ID and the letter would make identification more difficult, but if there is no specific interest in identifying these people the best option would be to replace the first and last name with a numerical code.

IV

Finally, in relation to the list of workers who meet compatibility criteria to work in the public and private company that the claimant requests in the second point, and as stated in the resolution, the interested party has the link of the Transparency Portal where the extract of the compatibility resolutions of professionals in the public sector Health is or should be published, as provided for in articles 8.1. g) of law 19/2013, of a basic nature, and article 9.1.m) of the LTC (in this case only for senior positions). In this list you can check which professionals of the Consortium are authorized for compatibility, information that the interested party initially requested.

In the supplementary document presented as part of the procedure, the claimant states that he is interested in knowing if there are emeritus who earn from the public company and also work for the private com

Decree 68/2005 regulates the procedure for the appointment of emeritus staff which begins at the request of the person interested in being appointed and ends with the resolution of the health advisor, who also agrees on their affiliation to a center. Despite the fact that the procedure does not expressly establish the publication of the appointment resolution, the procedures relating to the provision of jobs for public employees are based on the principles of equality, merit, capacity and publicity (article 78 of the EBEP).

Also, article 9.1.e) of the LTC foresees the publication of the "results of the selective processes for provision and promotion of personnel". Consequently, it must be understood that the appointment of this staff must also be published.

In addition, the appointment as emeritus staff is an honorary and lifelong recognition that aims to highlight a meritorious and outstanding professional career. This recognition is therefore a public recognition. In fact, the person who has been recognized

as such it has the power to use this recognition publicly and privately as well as other prerogatives related to the use of the facilities of the center to which it has been assigned.

Bearing in mind that both appointments as emeritus doctors, as well as information on the performance of compatible activities should be the subject of publication, it does not seem that there could be any inconvenience in informing the claimant of the identity of the emeritus staff of the center who are authorized to compatibility This without prejudice to the concurrence of personal circumstances that may be alleged in the hearing procedure provided for in article 31 of the LTC.

Conclusions

The right to data protection would not prevent the claimant from being given an individualized list with the annual remuneration received by the people who have been appointed as emeritus doctors of the entity. However, given the terms in which the claim is specified, in accordance with the principle of minimization, identification by replacing the first and last name with a numerical code could be sufficient.

There would be no inconvenience in providing the claimant with the identity of the emeritus staff authorized for compatibility.

Barcelona, September 10, 2019