

Ref. : IAI 45/2019

Report issued at the request of the Commission for the Guarantee of the Right of Access to Public Information in relation to the claim presented by a citizen against a Department for the denial of access to information on the prior information files open to different pharmacies .

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 by a citizen against a Department for the denial of access to the information on the sanctioning or prior information files open to different pharmacies.

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 March 1, 2019, the owners of a pharmacy office - interested in a disciplinary procedure opened by the Department of Health - request from this administration access and copy of the disciplinary files opened as a result of the resolution of 16 April 2018 by CatSalut, by means of which it was ordered to initiate inspection actions at the ten pharmacies with the highest billing volume in Catalonia.

The applicants consider that they are directly and legitimately interested in any action carried out by this administration based on the aforementioned resolution, which has motivated the disciplinary proceedings against them. For this reason, they state that it is of interest to them to have access to the pending sanctioning files of the other nine pharmacies with the highest billing volume in Catalonia, for the purpose of knowing the facts allegedly considered infringers, if applicable, the alleged legal basis and his defense All this, in order to defend their interests in the sanctioning file they have with the administration.

They also allege that the knowledge of said information may be of interest for an ongoing legal proceeding between the Administration and an association of which they are part.

2. On March 25, 2019, the Department of Health decided to partially approve the request for access to the information presented as follows:

1.- Reject access to the documentation that makes up the file that is in the investigation and verification phase, under article 21.1. sections b) and) of the 1972014 Law.

2.- Condition access to the documentation that makes up the eight completed files, without the existence of facts constituting an administrative infraction having been detected, to the allegations that may be made by the persons holding the pharmacy offices inspected when it contains personal data with information that may affect

their rights and interests, in application of article 31 of the LTC. For these purposes, the deadline for resolution is suspended and the request is transferred to the affected persons

3. On April 17, 2019, the Department decides to reject the request, considering that the requested information is affected by the access limitation provided for in articles 21.1. f) of Law 19/2014 and 14.1.h) of State Law 19/2013.

4. On May 16, 2019, the interested parties filed an appeal in which they request the revocation of the resolution.

The appellants state, in summary, that the inspection actions carried out constitute an arbitrary, abusive decision and a deviation of power, that the right of access to public information has been violated, given that the rejection of the request is not motivated, based on economic and commercial interests, since the data could have been dissociated, and given the volume of existing pharmacy offices in Catalonia, it would not have been possible to know which pharmacy office the inspection actions referred to.

Finally, they request as a subsidiary and in the event that the appeal is not considered, that a series of questions be answered related to the inspection actions carried out in the eight files filed, information that would be dissociated and without personal data.

5. On June 14, 2019, the Department decides to dismiss the appeal for reinstatement presented, and agrees to respond within one more time to the request for information requested in the appeal on a subsidiary basis.

6. On July 15, 2019, the interested parties filed a complaint with the GAIP against the decision denying access to the requested information, they asked for its revocation, and that their request be upheld. In the alternative, they request answers to the questions set out in the replacement appeal.

The claimants point out, among other reasons, that the personal data of the pharmacists who are the owners of the inspected pharmacies are not part of the subjective scope of application of the data protection regulations as they are data of professionals in the work area. They point out that, according to the jurisprudence, the data of individual entrepreneurs derived from their pharmaceutical activity are not within the subjective scope of the pe

They highlight the fact that, in any case, they asked the Administration to delete the data they considered personal, without it having yet spoken.

They state that both the pharmaceutical action and the sanctioning action are regulated actions, with no margin of discretion, so the information that is claimed cannot include data of a private nature from the businesses of the inspected pharmacies, as the Department argues.

7. On July 16, 2019, the Department issues a new resolution on the request for dissociated information and without personal data, formulated by the claimant as a subsidiary in the fifth allegation of the appeal, estimating and answering the questions raised in the appeal, in relation to the results of the health inspections carried out at the different pharmacy offices.

8. On August 30, 2019, the GAIP requests this Authority to issue the report provided for in article 42.8 of Law 19/2014, of December 29, on transparency, access to public information and good governance, in relation to the claim presented.

Legal Foundations

I

In accordance with article 1 of Law 32/2010, of October 1, of the Catalan Data Protection Authority, the APDCAT is the independent body whose purpose is to guarantee, in the field of the competences of the Generalitat, the rights to the protection of personal data and access to the information linked to it.

Article 42.8 of Law 19/2014, of December 29, on transparency, access to public information and good governance, which regulates the claim against resolutions on access to public information, establishes that if the refusal has been based on the protection of personal data, the Commission must issue a report to the Catalan Data Protection Authority, which must be issued within fifteen days.

For this reason, this report is issued exclusively with regard to the assessment of the incidence that the requested access may have with respect to the personal information of the persons affected.

Therefore, any other limit or aspect that does not affect the personal data included in the requested information is outside the scope of this report, as would be the case with the limit established in article 21. b) 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

Article 4.2) of the RGPD considers “treatment”: any operation or set of operations carried out on personal data or sets of personal data, either by automated procedures or not, such as collection, registration, organization, structuring, conservation, adaptation or modification, extraction, consultation, use, communication by transmission, diffusion or any other form of enabling access, comparison or interconnection, limitation, deletion or destruction.”

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, section c) provides 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".

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 this legal basis of article 6.1.c) of the RGPD when this is established by a rule with the rank of law.

For its part, article 86 of the RGPD provides that "the personal data of official documents in the possession of any public authority or public body or a private entity for the performance of a mission in the public interest may be communicated by said authority, organism or entity in accordance with the Law of the Union or Member States that applies to them in order to reconcile public access to official documents with the right to the protection of personal data under this Regulation.”

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

Article 18 of Law 19/2014 establishes that "people have the right to access public information, referred to in article 2.b, individually or in the name and representation of any legal entity constituted" (section 1). The mentioned article 2.b) defines "public information" as "the information prepared by the Administration and that which it has in its power as a result of its activity or the exercise of its functions, including the which are supplied by the other obliged subjects in accordance with the provisions of this law”.

The documentation and/or information related to prior information files opened at the pharmacy offices requested by the claimant is public information for the purposes of article 2.b) of the LTC and, therefore, subject to the right of access (art. 18 of the LTC). This right, however, is not absolute and may be denied or restricted for the reasons expressly established in the la

Specifically and with regard to the protection of personal data, it is necessary to assess the personal data that would be affected by the access and determine whether or not the right to data protection of the affected persons can justify a limitation, of in accordance with the criteria set out in articles 23 and 24 of the LTC and the regulatory principles of the personal data protec

III

Article 23 of the LTC establishes that requests for access to public information must be denied if the information sought contains "specially protected personal data, such as those relating to ideology, affiliation 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 affected I expressly consent to it in writing that must accompany the request."

Along the same lines, article 15.1 of Law 9/2013, provides, according to the new wording given by the eleventh final provision of the LOPDGDD: "(...) If the information includes personal data that refers to racial origin, health or sex life, includes genetic or biometric data or contains data related to the commission of criminal or administrative offenses that did not lead to a public reprimand to the offender, access may only be authorized if with the express consent of the person affected or if he was covered by a rule with the rank of law."

These precepts exclude the citizen's right of access to data related to the commission of criminal or administrative offences, unless the express consent of the affected person is obtained, or if this entails a public reprimand to the offender .

Regulation (EU) 2016/679 of the European Parliament and of the Council, of April 27, relating to the protection of natural persons with regard to the processing of personal data (hereinafter, RGPD), extends its scope of protection to personal data understood as all information about an identified or identifiable natural person, and considers an identifiable natural person "any person whose identity can be determined, directly or indirectly, in particular by means of an identifier, como por ejemplo a number, an identification number , location data, an online identifier or one or more elements of the physical, physiological, genetic, psychological, economic, social, or cultural identity of the person." (Article 4 of the RGPD).

Excluded from this scope of protection are the data of legal entities, as specified by the RGPD itself, establishing that "The protection granted by the present Regulation must be applied to natural persons, regardless of their nationality or place of residence, in relation to the processing of your personal data. This Regulation does not regulate the processing of personal data relating to legal entities and in particular to companies established as legal entities, including the number and form of the legal entity and its contact details. (Recital 14). To the extent that legal entities are not holders of the right to the protection of personal data, the limit of article 23 of the LTC or 15 of Law 19/2013 does not apply to them.

On the contrary, this limit would be applicable in the event that the information provided allows the physical person(s) affected to be identified directly or indirectly. Bearing in mind that in accordance with article 3 of Law 31/1991, of December 13, on pharmaceutical regulation of Catalonia, "1. The ownership of the pharmacy office corresponds to one or more pharmacists, who are the owners and who are responsible for the functions mentioned in article 2", the information related to the commission of criminal or administrative offenses

of the respective pharmacy offices remains affected by the limitation provided for in the aforementioned articles.

With regard to the commission of criminal or administrative offenses by individual entrepreneurs or liberal professionals (in this case, pharmacists), and in line with the criterion supported by this Authority in previous reports (among others, IAI 4 /2019, IAI 8/2018, 27/2016 and IAI 33/2016), it is considered that although it is true that information related to violations committed in the course of the professional or commercial activity that is carried out must affect in principle to the owner's commercial and economic interests which should remain within their business or professional sphere, disclosing this type of information may also have harmful effects that go beyond the strictly professional or business sphere. Thus, reporting on the alleged infractions committed by these people or on the sanctions imposed may affect not only their personal patrimonial sphere, (in the event that they come to be sanctioned), but may even affect their prestige or their social image - remember that the offender is the employer or, in this case, the owner of the pharmacy - for facts for which responsibility is attributed to him even before he has been sanctioned administratively or judicially, in the event that the procedure has not ended.

Neither article 23 of the LTC nor article 15.1 of Law 19/2013 establish any type of distinction in relation to the limitations of access to information relating to the commission of criminal or administrative offenses by natural persons and this means that the privacy expectations of individual entrepreneurs or liberal professionals regarding the possibility of third party access to this information are exactly the same as those that any other person may have.

In this case, the claimant initially requested access to the documentation and/or information contained in different sanctioning files that would have been opened following a CatSalut resolution ordering the performance of inspections at the 10 pharmacies with highest turnover volume in Catalonia.

According to the Department's report sent to the GAIP, of the information files opened as a result of these inspections, one - the one opened to the owners of the pharmacy who claim the information - would have ended with the opening of a disciplinary file; eight, would have been archived when facts constituting an administrative offense were not detected; and another, continues in the investigation phase with the purpose of finding out the circumstances of the facts that may constitute an administrative offense.

IV

With regard to the file that is in the investigation phase, warn that the fact that at the time of the inspection report the commission of any infraction has not yet been declared and that not even once the procedure to sanction them has been initiated, it does not exclude the application of the limit provided for in article 23 LTC.

To note at this point, that article 23 of the LTC does not refer to the need for a penalty to have been imposed, or even for the commission of an offense to have been formally and definitively declared, but which refers to "specially protected personal data, such as (...), and also those relating to the commission of criminal or administrative offences."

In this sense, while this phase of investigation lasts, and beyond that the limitation provided for in article 21.1 b) of the LTC can be appreciated, the information on the facts or conduct attributable to the owner/s of the pharmacy that is being investigated, to the extent that it may be constitutive of criminal or administrative offenses must be understood to be included and, therefore, affected by the limitation of article 23 of the LTC.

Therefore, from the point of view of the data protection regulations, the transparency legislation would not in this case constitute a valid legal basis for the treatment of the information contained in these actions of prior information, which allows the direct identification or indirect from the owner or owners of the investigated pharmacy. All this, without prejudice to the fact that, where appropriate, the information may be provided prior to personal data being anonymized, an aspect that will be analyzed in the sixth foundation.

v

With regard to the information files which, according to the Department, have been archived because facts constituting an administrative offense were not detected, their inclusion within the limitation provided for in article 23 of the LTC can certainly raise doubts.

The fact of not including them would lead us to have to make a reasoned weighting between the different rights and interests at stake, in the terms provided for in article 24.2 of the LTC, according to which when "it is about other 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. (...)"

In the case analyzed, the claimants base their request for access on the exercise of the right of defence. At first, they show an interest in knowing the facts allegedly considered infringing, the alleged legal basis and the defense by the different pharmacies, and defend themselves in the sanctioning procedure opened against them. Subsequently, knowing that there are eight inspection actions that have been archived, the interest lies, -according to the appeal for reinstatement-, in knowing the reasons why these have been archived performances. In this sense, they show their disbelief at the fact that only they have been sanctioned, and allege arbitrary actions by the Administration in the exercise of sanctioning power.

From the point of view of the people affected, the mere fact of providing information on whether a person has been investigated in relation to conduct or facts in order to find out whether or not they are punishable, even if it is ultimately determined that they are not they are, it could cause serious damage to the privacy of the person affected.

According to the Department's report, of the eight affected pharmacies, seven would have submitted allegations opposing access (at first 5, and later 7), and apparently one would not have accessed the electronic notification of the hearing procedure carried out.

The file contains the allegations presented by the owners of the affected pharmacies opposing access to the inspection actions taken in their establishments considering that these contain personal data and private information that affects their commercial interests. Specifically, it is made clear that the inspection actions include billing data and standardized internal work procedures, which are integrated in various areas within the pharmacy, even the philosophy and values of the pharmacy.

You must be aware that the people who are inspected by the administration on facts or acts that may constitute an infringement, count on the fact that the information that can be collected in the file will not be disclosed, and in this sense, their privacy expectations do not differ from those they may have in the event that breaches of the regulations had been detected as a result of the inspection.

It is true that in this case, the facts would be related to their professional activity, and the reasons they allege are more related to the eventual damage they may cause to their commercial interests, (limitation provided for in article 14.1 .h) of Law 19/2013, and reason for denying access in this case). Even so, it cannot be ignored that the effects of disclosing said information could go further and affect his personal sphere, not only because he was investigated, but also because he was one of the 10 pharmacies with the highest billing volume in Catalonia.

Having made these considerations, appreciable in all cases, it is concluded that despite the doubts that may arise regarding the inclusion of personal information related to inspection actions completed with an archive for no violations having been detected, a reasoned weighting between the different rights and interests at stake, leads us to enforce the right to privacy of the owners of the affected pharmacies, and limit access to the personal information they may contain.

VI

It is worth saying that the claimants themselves admit the possibility of the information being provided to them in a dissociated manner. In fact, it does not seem a priori that it can be justified for the exercise of the claimants' right of defense in the sanctioning file that the Administration maintains against them, to obtain information about who are the owners and/or the pharmacies investigated.

Facilitating access to public information prior to anonymization of the personal data contained therein is, in fact, an option expressly provided for in the transparency regulations. Thus, article 15 of State Law 19/2013 establishes that "4. What is established in the previous sections will not be applicable if access is effected prior to the dissociation of personal data in a way that prevents the identification of the affected persons."

However, so that anonymization can be considered sufficient for the purposes of data protection legislation, it is necessary to ensure that the information provided cannot be related to an identified or identifiable natural person.

To determine if a natural person is identifiable "must be taken into account all the means, such as singularization, that can reasonably be used by the person responsible for the treatment or any other person to directly or indirectly identify the natural person. To determine whether there is a reasonable probability that means will be used to identify a natural person, all objective factors must be taken into account, such as the costs and time required for identification, taking into account both the technology available at the time of the treatment as technological advances" (consideration 26 RGPD).

Taking this into account, it would be necessary to eliminate from the documentation of these prior information files, not only the information that is properly identifying, but also that which can relate to the holders and identify them. It is up to the Department, responsible for the treatment and knowledgeable about the information, the context and the specific area of the people affected, to make this assessment.

In this regard, the Department, when resolving the appeal, informs the interested parties that "a dissociation of the data (in the case of acts of inspection, concealment, as a measure that would prevent the identification of the pharmacy in particular as the owner of the data contained therein, if it is taken into account that the acts contain a set of information that, not in isolation but if in a related way, could be associated with the subject owner of the same, which is particularly relevant in the context in which this request for access is raised, in which it is known that the inspections were limited to the narrow scope of the ten pharmacies with the highest billing volume in Catalonia."

The affected people who object to access also consider that even if the personal identification data were hidden, due to the information contained in the file, it would be easily detectable to which pharmacy the ownership corresponds.

Certainly, we are dealing with a very small area, given that the information does not only affect a specific sector - the pharmaceutical sector - but is limited to the 10 pharmacies with the highest billing volume in Catalonia, with the addition that the claimants are the owners of one of these pharmacies. The analysis of the specific context is particularly relevant when assessing which information would make it possible to identify the affected persons and in this sense, it is possible that, as the Department points out, it is not feasible in this case to proceed with the 'anonymization of the data contained in the respective previous information files filed.

In exchange for this, and to respond to a request for information related to the inspections carried out, formulated by the claimants with a subsidiary character in the appeal for replacement, the Department would have provided them with the objective and specific information they requested from through several questions. It is foreseeable that in this way, and without accessing the specific files, the claimants were able to obtain information that they considered to be of interest to their rights and interests.

In any case, and given that -whether due to the direct application of article 23 of the LTC, or due to the result of a weighting favorable to the right to privacy of the owners of the investigated pharmacies-, it is necessary to limit access to any information that allows the owners of the investigated pharmacies to be identified directly or indirectly. Anonymization could only be carried out when it can be guaranteed that it is not possible to relate the information to the

This criterion would be applicable not only to information files that have been archived, but also to the file that is still in the investigation phase.

VII

With regard to the information on the persons responsible (public employees) for the inspection actions and/or the archive, it should be borne in mind that this is merely identifying data related to the organization, operation or activity public administration, and in accordance with article 24.1 of the LTC, access must be granted, unless exceptionally, in the specific case the protection of personal data or other constitutionally protected rights must prevail.

Therefore, unless there is a personal circumstance in these persons that can justify a limitation of access, it will be necessary to provide the claimant with the name and position of the public employees in charge of the investigation and closing of the respective information files.

CONCLUSION

Article 23 LTC prevents the claimant's access to any information contained in the information file that is in the investigation phase, which allows the direct or indirect identification of the owner/s of the investigated pharmacy.

With regard to the archived information files, a weighting between the rights and interests at stake leads to prevail the right to privacy of the affected pharmacy owners, and exclude access to any information that allows the direct or indirect identification of these people

There would be no impediment to facilitate access to the identification data (name, surname and position) of the people who have intervened in the respective actions.

Barcelona, September 17, 2019