

CNS 47/2020

Opinion in relation to the query made by a City Council regarding a councilor's access to the names and surnames and other information of the natural persons concessionaires of the Municipal Market

A letter from a City Council is presented to the Catalan Data Protection Authority, in which it is requested that the Authority issue an opinion on the access of a councilor to the names and surnames and other information of natural persons concessionaires of the Municipal Market.

Specifically, the City Council refers to the fact that an opposition councilor has requested various information about the concessions of the sales spaces at the Municipal Market, among which he wishes to know the names and surnames of the natural persons who are concessionaires. In the City Council's opinion, the data relating to the name and surname are irrelevant data in relation to the intended purpose and, therefore, contrary to the principle of data minimization (Article 5.1.c) RGPD).

Having analyzed the request, which is not accompanied by more information, and in accordance with the report of the Legal Counsel, the following is ruled.

I

(...)

II

The Regulation (EU) 2016/679, of the Parliament and of the European Council, of April 27, 2016, General Data Protection (hereinafter, RGPD), in accordance with what is established in articles 2.1 and 4.1, is of application to the treatments that are carried out on any information "on 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".

Therefore, the data of legal entities are excluded from this scope of protection, as specified by the RGPD itself, establishing that "The protection granted by the present Regulation must apply 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).

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".

In accordance with the provisions of article 5.1.a), any processing of personal data must be lawful and, in this sense, the RGPD establishes the need to comply with one of the legal bases of article 6.1, among which section c) provides for the assumption that the treatment "is necessary for the fulfillment of a legal obligation applicable to the person responsible for the treatment".

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 of the Member States that applies to them in order to reconcile the public's access to official documents with the right to the protection of personal data under this Regulation".

The regulation and guarantee of public access to documents held by public authorities or public bodies is regulated in our legal system in Law 19/2014, of December 29, on transparency, access to public information and good governance (hereinafter, LTC), which recognizes individuals, in an individual capacity or in the name and representation of a legally constituted legal person, the right of access to public information, understood as such "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 that supplied by the other obliged subjects in accordance with the provisions of this law" (article 2.b) and 18 LTC). State Law 19/2013, of December 9, on transparency, access to public information and good governance (hereafter, LT), is pronounced in similar terms, in its articles 12 (right of access to public information) and 13 (public information).

For its part, the first additional provision of the LTC, in the second section, provides that "access to public information in matters that have established a special access regime is regulated by their specific regulations and, with supplementary character, by this law".

In the case we are dealing with, in which the access of a councilor to the information relating to the concessions of the sales spaces of the Municipal Market is considered, among which the names and surnames of the concessionaire natural persons are requested, the provisions established by local regime legislation apply, mainly Law 7/1985, of April 2, regulating the bases of the local regime (LRBRL) and Legislative Decree 2/2003, of April 28, by which the revised Text of the Municipal and Local Regime Law of Catalonia (TRLMRLC) is approved, without prejudice to the fact that, in everything not provided for in these regulations, the LTC is additional.

III

It should be noted that this Authority has previously had the opportunity to analyze the councilors' right of access to the information available to their corporation, necessary for the exercise of

functions that correspond to them, regardless of whether they are in the government team or in the opposition (among others, in the opinions CNS 10/2017 or CNS 29/2018, as well as in the reports IAI 48/2019 or IAI 52/2019 available on the website <https://apdcat.gencat.cat>).

Thus, article 77.1 of the LRBRL establishes that "all members of local corporations have the right to obtain from the Mayor or President or the Government Commission any background, data or information held by the services of the Corporation and result preciso para el desarrollo de su funcio", or article 164.1 of the TRLMRLC in providing that "all members of local corporations have the right to obtain (...) all the background, data or information that are held by the corporation's services and are necessary for the development of its function."

In similar terms, the Municipal Organic Regulation of the City Council (ROM) is pronounced according to which, "All members of the corporation have the right to obtain from the Mayor or the Government Commission, all the antecedents, the data, the information that are in the possession of the Corporation's services and are necessary for the development of their function in the terms established in the following articles."

The right to obtain all the antecedents, data or information that are in the possession of the services of the local corporation and necessary for the exercise of their functions, in accordance with repeated jurisprudence on this issue (SSTS September 27, 2002, June 15, 2009, among others), is part of the fundamental right to political participation enshrined in article 23.1 of the Spanish Constitution, according to which "citizens have the right to participate in public affairs, directly or through representatives, freely elected in periodic elections by universal suffrage."

It should be borne in mind that the elected officials participate in a public action that manifests itself in a wide range of specific matters, such as the right to audit the actions of the corporation, the control, analysis, study and information of the necessary antecedents, which have the services of the City Council, for their control task and to document themselves for the purposes of adopting decisions in the future (among others, STS of March 29, 2006).

However, as this Authority has already reminded on several occasions, the exercise of this right of access to municipal information is subject to the regime provided for in the TRLMRLC and, where appropriate, in the Municipal Organic Regulations or the Regulations organization, operation and legal regime of local entities (ROF), approved by Royal Decree 2568/1986, of November 28, and of the supplementary nature of the LTC in everything that this regulation does not provide

Thus, article 164 of the TRLMRLC provides in which cases the services of the local body must provide information directly to its members and when the information or documentation must be requested, in the following terms:

"[...] 2. The services of the corporation must directly provide information to the members of the corporations when:

- a) Exercise delegated functions and the information refers to their own affairs responsibility

b) These are matters included in the agenda of the sessions of the collegiate bodies of which they are members. c) It is about access to information or documentation of the local corporation that is freely accessible to citizens.

3. In the other cases, the request for information is understood as accepted by administrative silence if a negative resolution is not issued within four days from the date of presentation of the request. In any case, the negative resolution must be motivated, and can only be based on the following assumptions:

a) When the knowledge or dissemination of the information may violate the constitutional right to honor, personal or family privacy or one's image. b) When it comes to matters affected by the general legislation on official secrets or by summary secrecy."

Regarding the Municipal Organic Regulation of the City Council (ROM), it also has a regime similar to the following articles:

"Art. 56. – Information will be provided directly to members of the Corporation in the following cases:

a) When they exercise delegated functions and the information refers to their own affairs responsibility
b) When it comes to matters including the agenda of the sessions of the collegiate bodies of which they are members, from the moment the session is called.

Art. 57. — A written request will be required, addressed to the Mayor's Office in order to consult any administrative file, in process or archived, and the corresponding authorization signed by the Mayor or the Councilor of the area, who must present- to the Department under its custody

However, the request is understood to be accepted by administrative silence, if no resolution is issued denying the consultation within four days from the date of presentation of the request in the General Registry of the Town hall. The decision denying the consultation of the file must be carried out by means of a reasoned Mayor's Decree and can only be based on the following assumptions:

a) When the knowledge or dissemination of the information may violate constitutional rights, honor, personal or family privacy, or one's own image. b) When it comes to matters affected by the general legislation on official secrets, statistics, or those that affect the area protected by the legislation limiting access to informative data banks.
c) When the matters are the subject of judicial proceedings and are under summary secrecy. d) Matters relating to public safety and civil protection, which publicity could be negative and cause the alteration of public order or state of restlessness in the population.

Art. 58. — Consultation of the official books of acts, decrees, and any other documentation to which the citizen in general has access, will be freely accessible by Councilors at the City Council Secretariat."

In the consultation it is pointed out that the councilor has requested various information in relation to the concessions of the sales spaces of the Municipal Market, among which he is requesting the names and surnames of the natural persons who are concessionaires. To the extent that this request does not comply with any of the conditions provided for direct access by councilors (articles 164.2 RLMRLC and 56 ROM), the request for access must be requested from the Mayor.

Access requests may be denied when any of the circumstances provided for in article 164.3 of the TRLMRLC occur, but access could also be denied, given the fundamental right nature of the right to data protection (STC 292/2000) and the need to respect the regulation contained in a European Regulation, which enjoys primacy over internal law, when there are specific circumstances related to personal data that justify it, in particular under the protection of the principle of minimization of data, according to which "personal data will be adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed" (Article 5.1.c) RGPD).

In this sense, the City Council expresses doubts about the access to the names and surnames of the natural persons who are concessionaires of the sales spaces of the Municipal Market considering that "[...] they are irrelevant data for the purposes of the requested information and that providing them is contrary to the principle of data minimization [...]."

This principle implies, on the one hand, that access to municipal information that includes certain personal data, without the consent of those affected, must necessarily be linked to the exercise of the functions that correspond in each case to the councilor of which it is treated, in the terms provided for in the local regime legislation.

Thus, the processing of personal data that can be carried out by a councilor who is not assigned government responsibilities would find its justification, from the perspective of data protection, in the exercise of the functions attributed to him as a member of bodies members of the local entity itself and, in a special way, in the functions of control and supervision of municipal action, such as the formulation of questions, interpellations, motions or even the motion of censure, which attributes the regulations of the local regime.

Any other processing that may be carried out based on the knowledge of the personal data of the interested parties and that does not comply with the exercise of their functions would imply, at the outset, a change of purpose that would require the consent of the interested person or his protection by I

On the other hand, the application of the principle of data minimization also implies that the treatment of essential data to fulfill the purpose is justified. Therefore, this principle entails making, for each specific case, a weighting in order to assess the implications that, in each case, the exercise of the councilors' right of access to information may have for the rights of the people affected, such as the right to the protection of personal data (Article 18.4 EC).

The Authority points out, as elements to consider when carrying out this weighting - which corresponds to the City Council, as responsible for the treatment (article 4.7) RGPD)-, the categories of personal data that the requested information or documentation contains, the intended purpose, the terms in which the request is made, the possible subjects affected or

other circumstances of the specific case, in order to assess whether this information is necessary to achieve said purpose or requires special protection.

IV

As can be seen from the statements made by the City Council in the consultation, the local body considers that access to the names and surnames of the natural persons who are concessionaires of sales spaces in the Municipal Market is irrelevant “[...] for the purposes of the requested information and [...] providing them is contrary to the principle of data minimization”.

We must bear in mind that the information requested is linked to the status of holder of a municipal concession for the exclusive use of a municipal public domain space (the stalls and commercial premises of the municipal market) which, as set out in the Municipal Market Regulation (art. 13) it is awarded to specific people through a public tender procedure. Therefore, it is awarded through a competitive procedure.

In accordance with article 218.1.b) and 218.4 TRLMRLC, the private use of public domain assets is subject to concession. And in accordance with article 221 of the same TRLMRLC, the granting of concessions is the competence of the plenary session, although they can be delegated to the Board of Governors, as long as the amount does not exceed 10% of the ordinary budget of the 'Town hall.

That being the case, it is obvious that all the councilors of the City Council can have access to the identity of the people awarded the municipal market concessions.

But in addition, there are still other additional elements that can also lead to the same conclusion. At the outset in the weighing between two fundamental rights (the right of access of councilors and the right of access to data protection) it must be taken into account that the information requested affects the professional or business sphere of the natural persons holding concessions, so while it is true that it continues to be personal information insofar as it refers to information about these persons, it does not affect aspects of their private or family life, which form part of your intimate life or that include data relating to special categories of data.

But in addition, it must also be taken into account that the transparency legislation contains provisions regarding the publicity of the patrimonial management of local bodies. In this sense, article 11.2 of the LTC provides for the publication of information on the economic management of the heritage. Bearing in mind that these are public domain assets, therefore in principle intended for public service or for use by all citizens, the fact that a right of private use is granted in favor of a specific citizen means that its award must be subject to minimal publicity requirements, at least with regard to the identity of the person awarded. The expectation of privacy that people who hold sales space concessions at the Municipal Market may have is less than that of other people who relate to the administration for other reasons.

Therefore, it is not contrary to the personal data protection regulations to reveal the identity of the concessionaires of the municipal market. However, in its consultation, the City Council refers to the fact that other information has also been requested regarding concessionaires, without specifying which information it is.

Although knowing the identity of the awardees may be appropriate to the right to the protection of personal data, the analysis of the origin of the granting of access to the rest of the information (which the City Council does not specify and in respect of which nor has the request made by the councilor been sent to this Authority) would require a particular analysis in view of the aforementioned principle of minimization.

VI

Finally, recall the applicability of the purpose limitation principle (Article 5.1.b) RGPD), under which any subsequent use of personal information by the councilor should also be based on a legitimate purpose. Otherwise, it could be a treatment not adjusted to the RGPD, even if the access to personal data was originally considered legitimate.

In addition, this purpose in which the subsequent processing of personal data by the councilor could be framed should not be incompatible with that which at the time would have justified the access, that is the exercise of the legally attributed functions .

For its part, in accordance with the principle of integrity and confidentiality (article 5.1.f)) "personal data will be treated in such a way as to guarantee adequate security of personal data, including protection against non- authorized or illegal and against accidental loss, destruction or damage, through the application of appropriate technical or organizational measures."

Therefore, if the subsequent use of the information to which the councilor has access by reason of his position involves disclosing the personal data contained therein to third parties, without the consent of the affected person or another legal basis to the contrary (Article 6 RGPD), it could also lead to an infringement of data protection regulations, even if the access was originally considered lawful.

On the other hand, remember that as long as the councilor's access to personal data is carried out due to the functions entrusted to him, apart from being governed by the principle of purpose limitation (article 5.1.b)) and by principle of integrity and confidentiality (article 5.1.f)) established in the RGPD is also governed by the duty of reservation imposed by local regulations.

Thus, article 164.6 of the TRLMRLC provides that "the members of the corporation must respect the confidentiality of the information to which they have access by virtue of their position if the fact of publishing it could harm the interests of the local entity or third parties."

In accordance with the considerations made in these legal foundations in relation to the query raised, the following are made,

Conclusions

The local regime legislation recognizes a right of access to councilors to the information that may be necessary for the performance of their functions (article 164 TRLMRLC). When it contains personal data, the personal data protection regulations must be taken into account.

The data protection regulations do not prevent councilors from accessing the identity of concession holders of stalls or commercial premises in the municipal market. With regard to access to the rest of the information that the City Council does not specify in its consultation, it would require a particular analysis in view of the aforementioned principle of minimization.

Barcelona, January 7, 2021

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