

Ref. : IAI 3/2020

Report issued at the request of the Commission for Guaranteeing the Right of Access to Public Information in relation to the claim against a City Council for the denial of direct access to a councilor in opposition to the Mayor's decrees.

The Commission for Guaranteeing the Right of Access to Public Information (GAIP) asks the Catalan Data Protection Authority (APDCAT) to issue a report on the claim against a City Council for denying access to a councilor the opposition to the Mayor's decrees.

Having analyzed the request, which is accompanied by a copy of the administrative file processed before the GAIP, and in accordance with the Legal Advice I issue the following report:

Background

1. On December 16, 2019, an opposition councilor requests from the City Council, access in digital format to all the decrees of the Mayor's Office, the agreements of the Local Government Board, those of the Autonomous Body Nursery School, and those of the Municipal Plenum registered between January 1 and December 31, 2018, and those registered between January 1, 2019 and the date of application submitted.

2. On December 18, the Mayor's Office issues a resolution in the following terms:

First.- Partially dismiss the request for access and copy of the documentation referring to the agreements of the Local Government Board and the Plenum requested, given that the councilor already has the minutes of these agreements or can directly access and autonomously on the City Council's Transparency Portal.

Second.- Arrange for the secretarial department to prepare the remaining copies requested, setting a deadline of no more than six months in order not to hinder the proper functioning of this department.

Third.- To make available for consultation the Book of Decrees for the year 2018, the minutes of the Independent Nursery School Organization for the year 2018 and 2019, remaining at your disposal the book of decrees for year 2019, when this is completed on December 31, 2019.

3.- On December 22, 2019, the interested party addressed a new instance to the town hall expressing his disagreement with the meaning of the resolution, regarding the refusal of the Town Hall to provide him with direct access to decrees of the Mayor's Office. In this sense, request a legal report from the municipal legal services in relation to the right of direct access of the councilors to the information of the official documents of the administrative acts of the City Council and the right to data protection

of the people who may appear in this documentation. It also requests that this report include whether the councilors have the right to obtain a copy of the documents of all the acts.

4.- On January 3, 2020, the Mayor's Office decides not to admit the application under article 29.2 of the LTC.

5.- On January 18, 2020, the interested party filed a claim with the GAIP against the City Council for the denial of direct access to the Mayor's decrees. Specifically, the claimant requests, as councilor of the corporation, to be able to directly access the requested decrees, briefly setting out the following:

- That paragraph 3 of article 42 of the Municipal Organic Regulation (ROM), defines five cases in which the members of the corporation have the right of direct access to municipal files and documents.
- That the city council has digitized administrative management through the IT application "GESTIONA" which allows direct access to files, records and municipal documentation.
- That authorized users have different profiles that give them access to one or another part of the available information, and that these are different depending on whether they are councilors who are part of the government coalition (with wider access) or councilors of the opposition (with more restricted access). Specifically, it states that direct access to the register of decrees provided for in article 42.3 of the ROM is not provided to opposition councilors through this application, and that the City Council would have established an alternative system of access to the decrees on paper individually, and with prior selection of the decrees of interest that must be viewed in person at the municipal offices

For all this, request the GAIP:

- That it be confirmed what their rights of direct access to decrees and resolutions are as members of the municipal corporation.
- That the limitations that may be imposed on the members of the municipal corporation regarding access to personal data "...merely identifying..." that may be contained in the municipal decrees are ratified or not, and if these limitations affect councilors differently depending on the municipal group to which they belong.
- That it be confirmed if they have the right to request, as members of the municipal corporation, a report or legal opinion from the municipal services in exercise of their right of access to information or if article 29.2 of the LTC supposes a limitation.

6.- At this date 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 with the claim submitted.

7.- It is not included in the report of the City Council in relation to the present claim.

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 request a report from the Catalan Data Protection Authority, which must be issued within fifteen days.

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.

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), applicable from May 25, 2018 (article 99), 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"

(Article 4.1) RGPD).

Therefore, any other limit or aspect that does not affect the personal data included in the requested information is outside the scope of this report.

The deadline for issuing this report may lead to an extension of the deadline to resolve the claim, if so agreed by the GAIP and all parties are notified before the deadline to resolve ends.

Consequently, this report is issued based on the aforementioned provisions of Law 32/2010, of October 1, of the Catalan Data Protection Authority and Law 19/2014, of December 29, of transparency, access to public information and good governance.

In accordance with article 17.2 of Law 32/2010, this report will be published on the Authority's website once the interested parties have been notified, with the prior anonymization of personal data.

II

The object of the claim is, as can be seen from the statements of the interested party and the set of information contained in the file, direct access to all the decrees, issued since January of the year 2018 until the date of the application (December 16, 2019).

Article 5.1.a) of the RGPD establishes that all processing of personal data (Article 4.2)) must be lawful, fair and transparent in relation to the interested party (principle of lawfulness, loyalty and transparency).

In this sense, article 6 of the RGPD establishes that there must be a legal basis that legitimizes the treatment, either the consent of the affected person (section 1.a)), or any of the other legitimizing bases that it provides, for example, that "the treatment is necessary for the fulfillment of a legal obligation applicable to the person responsible for the treatment (section 1.c)).

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 (hereafter LOPDGDD), the treatment of data 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."

From all this it follows that the councilor's access to the personal data that may contain the decrees requested on the basis of the fulfillment of a legal obligation by the City Council - responsible for the treatment - (art.6.1.c) RGPD), must necessarily be protected by a rule with the rank of law.

According to article 18 of Law 19/2014, of December 29, on transparency, access to public information and good governance (hereafter, LTC) "people have the right to access public information, referred to in article 2.b, in an individual capacity or in the name and representation of any legally constituted legal entity" (paragraph 1). The information contained in the decrees issued by the City Council is information prepared by the Administration for the purposes of article 2.b) of the LTC, and therefore remains subject to the right of access in the terms provided for by the legislation of transparency

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

In this case, the person requesting access has the status of councilor of the corporation, and therefore, the assessment that can be made regarding the obligation to provide or not provide personal information of third parties must be examined taking into account the right of access that the local regime regulations attribute to councilors - that is, Law 7/1985, of April 2, regulating the bases of the local regime (LRBRL) and the revised text of the Law municipal and local regime of Catalonia, approved by Legislative Decree 2/2003, of April 28 (TRLMRLC) - regarding that information available to the City Council that is necessary for the fulfillment of its functions.

This without prejudice to the fact that the councilor who requests information must be granted at least the same guarantees regarding access to information as the rest of citizens who do not have this condition of elected office, given the 'supplementary application of Law 19/2014 (additional provision first section 2).

III

As this Authority has done on previous occasions (among others, the reports, IAI 23/2018, IAI 24/2018, IAI 2/2019, IAI 48/2019 or IAI 52/2019, which can be consulted on the website <http://apdcat.gencat.cat>), the local regime legislation recognizes a right of access to all elected officials, regardless of whether they are in the government team or in the opposition, to the information they have their local corporation and that may be necessary for the exercise of the functions that correspond to them.

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 are necessary for the development of their function".

In the same sense, the TRLMRLC pronounces itself, by providing, in its article 164.1, that "all members of local corporations have the right to obtain (...) all the background, data or information that are in the possession of the services of the corporation and are necessary for the development of its function."

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."

The elected officials take part 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 that have the services of the City Council, for its control task and to document itself for the purposes of adopting decisions in the future (among others, STS of March 29, 2006).

However, the exercise of this right of access to municipal information is in any case subject to the regime provided for in the TRLMRLC, cited, and in the Regulation on the organization, operation and legal regime of local entities (ROF), approved by Royal Decree 2568/1986, of November 28, without prejudice to what may be established in the organization and operation regulations of each local entity.

It is therefore necessary to analyze the legal provisions of the aforementioned regulations in order to assess whether the local regulations or, alternatively, the transparency legislation would enable the transfer of personal data contained in the decrees claimed by the interested party.

IV

Article 164.2 of the TRLMRLC provides that "The services of the corporation must provide information directly to the members of the corporations when:

a) Exercise delegated functions and the information refers to matters of their own 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 "

In the same sense, article 42.2 of the ROM of the corporation provides that the members of the corporation will have direct access to administrative records and municipal documentation, without requiring prior authorization, among other cases, "2. When it comes to matters included in the agenda of the sessions of the collegiate bodies, of which they are part, as long as these have been convened", and establishes that "In this case, this documentation will be available to all the members of the Corporation in the offices of the municipal secretariat in the terms indicated in article 98 of this regulation."

Article 42 of the ROF provides that: "The Mayor will give a brief account to the Corporation, in each ordinary session of the Plenary, of the resolutions he had adopted since the last ordinary plenary session so that the Councilors know the development of the municipal administration in the effects of control and supervision of government bodies, provided for in article 22.2. a), of Law 7/1985, of April 2."

This is provided for in article 99 of the ROM by providing that the control part of the agenda of the ordinary sessions will include, following the order specified, the following matters: "2. Give an account of the mayor's resolutions and the agreements adopted by the local government board since the last session. "

The Mayor's obligation to give accounts to the Plenary of the decrees or resolutions adopted by the municipal governing bodies is part of the ordinary sessions of the Plenary, and the notification of the decreed resolutions allows the councilors to inspect them, and control- them, formulating in that same session or in the following one, questions, requests and interpellations, as an indispensable control mechanism of the activity of the municipal administration and therefore, directly connected with the exercise of control functions and control they have attributed, recognized in article 22.1.a) LBRL.

For the purposes of making this control and supervision effective, in the course of the ordinary functioning of the plenary sessions, the members of the corporation must be able to know all the relevant aspects of the decisions adopted by the governing bodies, and this includes not only the object of the resolution, but also the identity of the people who have been affected by it (to whom a license has been granted, to whom a contract has been awarded, to whom aid has been granted, etc.), as well as the reasons or foundations that justify the decision taken in each specific case, even accessing the full text of the resolutions. Only in this way can the effective control of the activity of the municipal administration be guaranteed.

Access to the full content of these resolutions adopted by the governing bodies would be given by the Mayor's obligation to inform the elected members of the resolutions issued since the last session of the Plenum for purposes of control and supervision of the Administration's performance

Municipal, in accordance with articles 164.2 b) TRLMRLC and 42 ROF. In this sense, it does not seem that the right of the councilor to obtain from the City Council direct access to the information contained in these decrees can raise doubts from the perspective of the personal data protection regulations.

In fact, the City Council states in the resolution, that on September 24 and November 25, 2019, it made available to the councilor, the consultation of the decrees included in the list of decrees issued between May 16 and December 15 2019, for the convocation of the plenary session of September 26, 2019 and of the dictations between September 16 and November 22, 2019 for the convocation of the month of November 28, 2019.

It is worth saying that this direct access has the specific purpose of allowing the councilor to know all the necessary elements to be able to control or supervise the actions of the governing bodies in the plenary where they are discussed. Hence it makes sense to be able to access it prior to its completion.

After the plenary session, the specific purpose of the access provided for in the case of letter b) of article 164 TRLMRLC ceases.

This, however, does not mean that it cannot be equally relevant for the councilor to have this information for the purposes of being able to control and supervise government action. In fact, the councilor requests access not only to these decrees but to those issued since January 1, 2018, a request that goes beyond the direct access provisions of article 164.2 TRLMRLC and which are analyzed below.

v

So with regard to the accessibility of the decrees, apart from the assumption of direct access provided for in article 164.2 TRLMRLC, which the interested party claims, the following considerations are made.

The resolution of the mayor's office, of December 18, 2019, grounds its refusal to facilitate direct access and therefore to the full content of all the decrees requested, (1,532, in 2018 and 1,534, in year 2019), in the fact that there may be particularly sensitive data or linked to honor, privacy and self-image in the terms provided for in article 164.3 TRLMRLC. For these purposes, it decides to postpone the delivery for a maximum of 6 months in order to be able to make an individualized assessment of the personal information contained in the various decrees and to anonymize that which it considers should be limited.

Article 164.3 TRLMRLC provides that: "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 resolution denial 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 summary secrecy."

It should be noted that access requests may be denied when any of the circumstances provided for in the aforementioned sections a) or b) occur, but access could also be denied, given the nature of the right to data protection (STC 292/2000), when, regardless of whether certain data can be considered intimate or not, there are other specific circumstances related to personal data that justify it, in particular under the protection of the principle of data minimization, according with 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)). 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 what it is about, in the terms provided for in the local regime legislation (whether they are part of the governing bodies or not).

Thus, the differential element that can legitimize the access of a councilor to certain personal information of third parties processed by the City Council, is not given, by the fact of being a councilor of the political party that governs or of the opposition, as points out the claimant, but because the knowledge of this information is necessary for the exercise of the specific functions attributed to this councillor. In this case, the processing of personal data that can be carried out by a councilor who is not assigned government responsibilities, can be justified, from the perspective of data protection, in the exercise of control and inspection functions 22.1

On the other hand, the minimization principle requires a weighting exercise to be carried out, in order to assess the implications that, in each case, the exercise of the right of access to councilors' information may have for the rights of the people affected , taking into account the circumstances of the specific case, the personal data contained in the requested documentation, the intended purpose and the terms with which the request is made or the possible subjects affected, among others. The aim of this weighting is to prevent excessive or irrelevant personal data from being communicated to councilors to achieve the intended purpose of the access, which must necessarily be linked to the performance of the duties of the councilor

For this reason, and beyond the cases of direct access specifically provided for in article 164.2 TRLMRLC, pursuant to section 3 of this same precept and in application of the principle of data minimization, it would be contrary to the RGPD to provide the councilor with direct access to the full content of all the resolutions claimed (either through of the implemented IT application used by the City Council to which the councilor refers or through any other means), and without prior weighting between the different rights at stake.

The claimant invokes article 42.3 of the ROM of the corporation, according to which the members of the corporation will have direct access to administrative files and municipal documentation, without requiring prior authorization (...): "When it comes to the consultation of the official books of resolutions of the mayor or of the one-person governing bodies (...).

In this sense, the City Council indicates in the resolution that the book of decrees for the year 2018 and the year 2019 will be made available to the claimant when it is ready. The claimant adds to the fact that this provision implies a prior indication of the decrees that he is interested in consulting.

Regarding this, note that even though the regulations provide that the members of the corporation can directly consult the book of resolutions or decrees, as one of the mechanisms of access to information for the exercise of control and inspection functions, councilors' access to the personal data that may be contained in the book of decrees that can be consulted must necessarily comply with the principles and guarantees of the RGPD.

It is not known what is the exact content that is recorded in the book of municipal decrees in this case (full text of the decree or an extract or summary thereof), but in any case, a regulatory provision that obliges the City Council (responsible for treatment) to facilitate direct access to the full content of the resolutions, must be based on a rule with the rank of law (art. 6.1.c) and 3 RGPD and 8 LOPDGDD), and this only occurs in the cases contemplated in article 164. 2 TRLMRLC.

Therefore, from the perspective of personal data regulations, the consultation of the book of decrees provided for in article 42.3 ROM, as a control and inspection mechanism of the governing bodies, must be done respecting the principle of minimization of the data, and this implies a prior weighting exercise that makes direct access to the affected personal information impossible.

VI

When making this weighting, it must be borne in mind that it is an indiscriminate access to all the decrees issued by the mayor's office during a specific period of time, without specifying the specific reasons for which access is of interest.

As the Authority has pointed out, and in accordance with local regime legislation and the jurisprudence of the Supreme Court, councilors cannot be required that, in order to access municipal information, they must explain or justify the purpose of your request, since the reason for your request must be understood as implicit in the exercise of their functions as councilors, who are responsible for the control and supervision of the governing bodies of the corporation, as and as explained in article 22.2.a) of the LRBRL.

Obviously, the fact that these are resolutions related to actions related to a legislative period prior to the current one, does not mean that it cannot be relevant information for the control and supervision of the governing body in the current legislature.

However, these decrees can be related to any of the areas of competence of the corporation (works and services, economic management, treasury, social services, urban planning, environment, public transport, human resources, etc.), and have as their object, the awarding of works or services, the granting or denial of grants or subsidies, permits or licenses, the appointment or termination of personnel, the imposition of fines or administrative sanctions, etc.

Therefore, the type of personal information contained in the resolutions can be of different nature and affect the privacy of the recipients to a greater or lesser degree. It is not a question of accessing, as the claimant points out, merely identifying data related to the organization and operation of the administration, but economic, labor or professional information. There may even be information related to special categories of data (Article 9 RGPD), data included in this category with a specific regime (those relating to administrative or criminal offences), or data deserving of a special reservation or confidentiality in attention to the

concurrency of certain qualified circumstances (for example, situations of social vulnerability, data of minors, data related to gender violence, or that allow the possibility of drawing up socio-economic profiles, etc.).

With respect to some of these matters, the same Transparency Law imposes the obligation to publish, for example, the purpose and identity of the successful tenderer (art. 13. d) LTC), the purpose and identity of the beneficiary of aid or subsidies (art. 15.1.c) LTC), which could be preserved for reasons of social vulnerability. Also in matters of organization, it is necessary to make public the list of temporary contracts and internships not linked to any job of the LRT, (article 9.1 d) LTC, the results of the selective processes of provision and promotion of personnel (art. .9.1.e)) LTC) and the relationship of senior officials (art. 9. 1. f) LTC).

In these cases, the prospects of privacy that the affected people may have with respect to the relationship maintained with the municipal administration, are limited, given the advertising regime to which they are exposed. Access to the text of the resolution would allow the councilor to know the background and legal foundations that justify the decision adopted, elements that may be relevant for the purposes of evaluating the criteria and decisions taken by the municipal government in these matters and, in principle, it does not seem that there could be reasons to limit the councilor's access to said information.

On the other hand, it does not seem that indiscriminate access to information related to special categories of data (art. 9 RGPD), or other information deserving of special protection, such as that related to the commission of criminal offenses or administrative, or any other that involves revealing information about people in a situation of special social vulnerability. This is information that can seriously affect the privacy of the people concerned.

The desire of the councilor to have knowledge of everything that the City Council decides in order to be able to control and supervise its actions, is not a sufficient reason to sacrifice the privacy of these people, and therefore, in these cases, access to these decrees must be made anonymous. This, without prejudice to the fact that there may be some specific exceptional case in which, prior to the request of the councilor, justified reasons are presented that demonstrate the need to obtain said information for the exercise of its control functions and auditing.

VII

Finally, it should be remembered that whenever the councilor's access to personal data is carried out due to the functions entrusted to him as such, he must be governed, aside from the duty of reservation imposed by the regulations of local regime (article 164.6 TRLMRLC), by the principle of purpose limitation (article 5.1.b)) and by the principle of integrity and confidentiality (article 5.1.f)) established in the RGPD.

Thus, article 164.6 of the TRLMRLC provides: "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."

Likewise, in accordance with the principle of purpose limitation (Article 5.1.b) RGPD), any use of personal information after access by the councilor should also be based on a legitimate purpose.

For its part, in accordance with the principle of integrity and confidentiality (Article 5.1.f) RGPD "personal data will be treated in such a way as to guarantee an 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."

Conclusions

The data protection regulations do not prevent direct access of the person making the claim to the full content of the decrees that must be brought to the attention of the plenary.

Apart from the above assumption, access to the full text of all the requested decrees requires an appropriate weighting in order to exclude information related to special categories of data (art. 9 RGPD), or other deserving information of special protection, such as that related to the commission of criminal or administrative offences, or any other that involves revealing information about people in a situation of special social vulnerability. In this case, the information should be provided anonymously. This, without prejudice to the fact that there may be some specific exceptional case in which, prior to the request of the councilor, justified reasons are presented that demonstrate the need to obtain said information for the exercise of its control functions and auditing.

Barcelona, February 13, 2020