

Ref. : IAI 08/2020

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 the Provincial Council for the denial of access to information relating to health inspections in municipal premises between the years 2016 and 2019.

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 a claim submitted by a citizen against the Provincial Council for the denial of access to the information on the data relating to health inspections in municipal premises between the years 2016 and 2019.

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 December 10, 2019, a citizen submitted a letter to the Provincial Council requesting:

"The detailed results of each and every sanitary and/or hygiene inspection carried out in bars, restaurants, cafeterias, nightclubs, pubs, clubs, canteens, cafeterias and bars in hospitals, clinics and other medical centers, public centers, educational centers (schools, universities, major colleges, institutes, nurseries...) and other places of restoration or food in the province that are inspected by the council or that the council has these data (any type of place or place according to a heading of activity that the Administration carries out hygienic-sanitary inspections and that the premises distribute food to the final consumer) between January 2016 and June 2019, both months inclusive. I ask that the information for each inspection include: type of premises where it was carried out (bar, restaurant, discotheque...), number of the premises, CIF of the company that owns it, headings of activity of the premises, date of the inspection, address of the premises, year of opening of the premises, what the inspection was about, if it was scheduled or why it was not carried out, result of the inspection (favorable, favorable conditioned, unfavorable, suspended, approved...), deficiencies, infractions or non-compliance found detailed todos ellos in the most specific existing category, the score obtained in the rating system of the municipal inspections that are carried out, the risk or frequency with which that premises is categorized for future inspections, if the inspections have proposed sanctions to that premises, if he has finished having them and which ones have been (date and amount). In the same way, I request to know the number of premises closed by the Administration, the date on which it was closed, why and the number and address of the premises. I also request a copy of the inspection protocol for this type of premises (bars, restaurants and other catering premises) by the Administration."

2. On January 10, 2020, you will be notified of a decision by which the request is partially accepted. Specifically, he is denied access "given that the ownership of the requested information corresponds to the town councils, as it is not the Provincial Council competent in health matters, a refusal that is also based on the affect on information relating to the commission of violations

administrative and personal data of specially protected third parties and, which would involve a complex task of elaboration and re-elaboration that would involve the collapse of the ordinary functioning of the Public Health Service (...), in accordance with the antecedents listed in the "file."

3. On January 16, 2020, the County Council will provide you with the following documentation:

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- The two protocols used for health inspections.
- From each municipality, the total number of establishments and visits made in the period from 2016 to 2019, and depending on the different types of establishments (bars, restaurants, groceries...).
- Link to the ASPCAT website where you can consult the reports on food safety in Catalonia, where the activity carried out by the local administration is collected, which incorporates the information provided by the Provincial Council at the request of the Generalitat."

4. On February 10, 2020, the interested party submits a claim to the GAIP against the Provincial Council for the partial estimate of the requested information.

5. On March 10, 2020, 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 government, 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.

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 April 27, relating to the protection of natural persons with regard to the processing of personal data (hereinafter, RGPD), provides that all processing of personal data must be lawful (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 article 6.1 to apply. Specifically, section c) provides that "the treatment is necessary for the fulfillment of a legal obligation applicable to the person responsible for the treatment" (letter c).

Law 19/2014, of 29 December 2014, on transparency, access to information and good governance, 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 information related to the health inspections carried out in catering and retail premises carried out by the Provincial Government during the years 2016 to 2019 is information that must be considered public for the purposes of article 2.b) of the LTC and, for therefore, it remains 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 laws. Specifically, and with regard to the right to the protection of personal data, it is necessary to take into account the limitations and criteria provided for in the transparency legislation (articles 23 and 24 of the LTC), and the principles of the data protection regulati

III

It is necessary to take into account, before entering the substance of the claim, two issues.

First of all, although the Provincial Council's report indicates that data is provided that allows the interested party to be identified as a journalist, this mere professional status would be irrelevant because the claimant does not rely on this status to access the public information you claim before the GAIP. In addition, it must be remembered that the mere status of a journalist does not, per se, entail the right of access to personal data of third parties that may contain the requested documents, as other weighting elements will have to be taken into account.

Secondly, given that from the initial request it follows that the information requested refers to the competences of other public administrations, it should be noted that this report will assess the

right of access to the personal data contained in the administrative actions derived from the exercise of powers of the Provincial Council.

IV

Having said that, the Provincial Government would have given the claimant the following information:

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- The two protocols used for health inspections.
- From each municipality, the total number of establishments and visits made in the period from 2016 to 2019, and depending on the different types of establishments (bars, restaurants, groceries...).
- Link to the ASPCAT website where you can consult the reports on food safety in Catalonia, where the activity carried out by the local administration is collected, which incorporates the information provided by the Provincial Council at the request of the Generalitat."

From there, the claimant considers that the information provided is partial and does not correspond to the information requested. In this sense, he claims that "the Provincial Council (...) has provided me with total data, a copy of the protocols they use and the number of inspections by type and municipality, but not the detailed result of each location and each inspection as I requested " without stating the reasons why he needs this greater detail.

According to the terms in which the claim is formulated, access would affect the information on the inspections carried out and on the sanctioning files that have been processed as a result of the possible infringements detected as a result of these inspections.

In this sense, article 23 of the LTC establishes:

"Requests for access to public information must be denied if the information sought contains particularly protected personal data, such as those relating to ideology, trade union affiliation, religion, beliefs, 'racial origin, health and sexual life, and also those relating to the commission of criminal or administrative offenses that do not entail a public reprimand to the offender, unless the affected party expressly consents by means of a written which must accompany the application."

In the same sense, article 15.1, second paragraph, of Law 19/2013, of December 9, on transparency, access to public information and good governance (LT), establishes:

"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 do not lead to a public reprimand to the offender, access it can only be authorized if there is the express consent of the person affected or if the latter is protected by a rule with the status of law."

These precepts exclude the possibility of accessing information related to the commission of criminal or administrative infractions, unless the sanction or penalty involves a public warning to the offender or the express consent of the affected party is the moment of formulating the request.

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 of personal data understood as all information about an identified or identifiable natural person (Article 4.1 of the RGPD).

Recital 14 of the RGPD establishes:

"The protection granted by this Regulation must apply to natural persons, regardless of their nationality or place of residence, in relation to the processing of their personal data. This Regulation does not regulate the processing of personal data relating to legal entities and in particular to companies constituted as legal entities, including the number and form of the legal entity and its contact details.

In this sense, the limit of article 23 of the LTC or article 15 of Law 19/2013, does not apply in cases where the owners of the premises or establishments about which information is requested are legal entities to the extent that legal entities are not holders of the right to the protection of personal data, and in this sense there may be no impediment to deliver the requested information to the claimant.

However, this limitation would be applicable in the event that the information provided allows the physical persons affected to be identified directly or indirectly, including individual entrepreneurs and liberal professionals who own the establishments or premises inspected

Thus, in the case of individual entrepreneurs 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 in principle affect commercial interests and economic of the holder which should remain within its business sphere, disclosing this type of information may also have harmful effects that go beyond the strictly business sphere.

In this sense, reporting on the alleged violations committed by these people or on the sanctions imposed may affect not only their personal patrimonial sphere, in the event that they are sanctioned, but may even affect their prestige or your social image - remember that the offender is the entrepreneur or owner of the business regardless of the commercial name that may be used by the establishment -, for some 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.

In addition, articles 23 of the LTC and 15.1 of the LT do not establish any type of distinction in relation to the limitations of access to information relating to the commission of criminal or administrative offenses by legal entities 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 individuals may have.

In this case, the names of the owners of the premises inspected and/or sanctioned are not requested (information that would allow the direct identification of those affected), and therefore the information requested can only affect the right to personal data protection to the extent th

information related to access allows these people to be identified indirectly, assuming that the access limitations provided for in the transparency regulations would be applicable.

In this sense, Recital 26 of the RGPD establishes:

"(...) To determine whether a natural person is identifiable, all means, such as identification, that can reasonably be used by the data controller or any other person to directly or indirectly identify the natural person must be taken into account. 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 like technological advances."

And article 4.1 RGPD provides:

"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 several elements of the physical, physiological, genetic, psychological, economic, cultural or social identity of said person."

Thus, the data protection regulations apply not only to the information of directly identified persons, but also to those persons who are indirectly identifiable.

In this case, the detail of information requested by the claimant regarding the inspections and violations committed, among others, the information referring to the name and address of the premises where these inspections have been carried out could make it possible to identify the persons responsible.

In addition, the inspection actions where infringements may have been detected can be premises or establishments where commercial activities are carried out, but could also, in some cases, coincide with private homes. Thus, it cannot be ruled out that, through the address or location data, the affected natural persons can be identified, including individual businessmen and liberal professionals who own the premises filed and/or sanctioned without making disproportionate efforts.

In addition, there may be information on the inspections carried out where allegedly irregular conduct has been detected even if they have not resulted in a disciplinary action. The fact that at the time the inspection report is drawn up, even if the commission of any infringement has not been declared and that the procedure to sanction them has not even started, does not prevent the application of the limit provided for in article 23 of the LTC. Thus, 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 to "(.. .) those relating to the commission of criminal or administrative offences". Therefore, the information contained in the inspection reports where a non-compliance is found, is information related to the commission of the infringement.

On the other hand, according to the Provincial Council's report, in the period between January 2016 and December 2019, services were provided to 145 municipalities and 7,109 visits were made to the 3,898 establishments in the retail and restaurant sector commercial, with which the indiscriminate access to all the names and addresses of the filed premises could end up causing the identification of a large number of people. In addition, the current owners of these premises might not be the people filed years ago.

For all of this it is concluded that although the data protection regulations do not prevent access to the information requested regarding the legal persons inspected or sanctioned, article 23 of the LTC limits access to those data that allows to identify, even if indirectly, the natural persons (including the individual business owners of the filed premises) such as the name and address of the inspected premises that are responsible, except in cases where the applicable material law provides the public admonition of the offender, or unless these people expressly consent by means of a written document that must accompany the request, or when a rule with the rank of law has expressly provided for its publication (article 15.1 LT) .

conclusion

The data protection regulations would not prevent the claimant from accessing the information requested about the inspections carried out by the Provincial Government, except for the information about the name and address of the premises where the actions have been carried out, or other information that allows to indirectly identify the natural persons holding them (including indiv

Barcelona, April 9, 2020