

IAI 9/2020

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 against a City Council for the denial of access to a file of reserved information

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 presented against one for the denial of access to a file reserved information.

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 20, 2019, a person, acting on behalf of a municipal kindergarten worker, submitted a letter to the City Council stating:

"That on December 16, 2019, my client received a notification informing them of the initiation of an information procedure and previous actions for events that occurred, presumably on an ongoing basis, at the Children's Home . By means of the same, it is also reported that the provisional measure of suspension of my client's work is adopted from the day after the notification."

Then request:

"Having submitted this letter, I consider the request made, under the protection of my right as an interested party, and as soon as possible transfer the requested administrative file and give me access to it ."

2. On January 21, 2020, this same person submitted a letter to the City Council (...) in which he reiterates his request for access to the file in question.

3. On January 28, 2020, the applicant filed a complaint with the GAIP against the City Council (...) for denying him access to the requested public information.

4. On February 7, 2020, by means of Mayoral Decree 2000-0012, it is decided to deny access to the public information requested under article 21 of Law 19/2014, of December 29, on transparency, access to public information and good governance.

5. On February 13, 2020, the applicant again files a claim with the GAIP against the City Council (...) to deny him access to the requested public information.

6. The file contains the report issued, on March 6, 2020, by the Mayor of (...) in relation to the claim made, in which, among other issues, he states that:

"The corresponding legal reports are being prepared in order to be able to issue the resolutions corresponding to the requests of the interested parties and to close the open reserved information."

7. On March 12, 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.

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), 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)).

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

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".

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 the LTC recognizes the right of people 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 person" (section 1).

Article 2.b) of the LTC 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 that supplied by the other obliged subjects in accordance with the provisions of this law".

The claim is lodged against the denial of access to the content of the reserved information prior to the start of a disciplinary procedure, initiated as a result of the denunciation of irregular facts and/or conduct attributed, by the information which is available, to two workers from the municipal nursery, one of whom turns out to be the person making the claim, who acts through her representative.

The information and/or documentation that makes up reserved information is "public information" for the purposes of the LTC (art. 19) and remains subject to the access regime provided for in this regulation, which establishes, as a general criterion, that the right of access to public information can only be denied or restricted for the reasons expressly established by law

From the file sent it appears that the documentation dealing with the reserved information regarding which access is requested may contain personal information referring to the same person requesting access (one of the reported municipal workers) and also personal information of third parties, such as information of the other investigated worker, of the person in charge of investigating the facts reported, of those people who have given a statement, of the reporting persons (the children's parents) and, even, of the child involved in the events reported.

It is necessary to examine, below, the possible limitations that may arise in relation to the requested access with regard to the right to the protection of personal data of the potential affected.

III

Regarding the claimant's access to information that refers to him/her, it is necessary to keep in mind article 15 of the RGPD, according to which:

"1. The interested party will have the right to obtain from the person in charge of the treatment confirmation of whether or not personal data that concern them are being processed and, in such case, the right to access the personal data and the following information: a) the purposes of the treatment; b) the categories of personal data in question; c) the recipients or the categories of recipients to whom the personal data was communicated or will be communicated, in particular recipients in third parties or international organizations; d) if possible, the expected period of personal data conservation or, if not possible, the criteria used to determine this period; e) the existence of the right to request from the person in charge the rectification or suppression of personal data or the limitation of the treatment of personal data relating to the interested party, or to oppose said treatment; f) the right to present a claim before a control authority; g) when the personal data has not been obtained from the interested party, any available information about its origin; h) the existence of automated decisions, including profiling, referred to in article 22, sections 1 and 4, and, at least in such cases, significant information about the logic applied, as well as the importance and expected consequences of said treatment for the interested party. 2. (...)

3. The person responsible for the treatment will provide a copy of the personal data subject to treatment. The person in charge may charge a reasonable fee based on administrative costs for any other copy requested by the interested party. When the interested party presents the request by electronic means, and unless he requests that it be provided in another way, the information will be provided in a commonly used electronic format.

4. The right to obtain a copy mentioned in section 3 will not negatively affect the rights and freedoms of others."

This precept recognizes the right of the affected or interested person (natural person holder of the data that is the subject of the treatment) to request and obtain from the person responsible for the treatment

a copy of your personal data subjected to treatment, including information on the origin of the data when these have not been obtained from the same interested person.

However, this right is not absolute and may be limited in accordance with the provisions of article 23 of the RGPD:

"1. The Law of the Union or of the Member States that applies to the person responsible or the person in charge of the treatment may limit, through legislative measures, the scope of the obligations and the rights established in articles 12 to 22 and article 34, as well as in article 5 to the extent that its provisions correspond to the rights and obligations contemplated in articles 12 to 22, when such limitation essentially respects fundamental rights and freedoms and is a necessary and proportionate measure in a society democratic to safeguard: a) the security of the State; b) the defense; c) public security; d) the prevention, investigation, detection or prosecution of criminal offenses or the execution of criminal sanctions, including the protection against threats to public security and their prevention; e) other important objectives of general public interest of the Union or of a Member State, in particular an important economic or financial interest of the Union or of a Member State, including in the fiscal, budgetary and monetary areas, public health and social Security; f) the protection of judicial independence and judicial procedures; g) the prevention, investigation, detection and prosecution of violations of deontological norms in the regulated professions; h) a function of supervision, inspection or regulation linked, even occasionally, with the exercise of public authority in the cases contemplated in letters a) ae) and g); i) the protection of the interested party or the rights and freedoms of others; j) the execution of civil demands. (...)"

In the present case, the reason for the denial of access cited by the City Council is that the request for public information refers to reserved information initiated to assess whether disciplinary proceedings are initiated against the person making the claim (and another municipal worker) as a result of the events reported by the parents of a child attending the municipal kindergarten.

Law 39/2015, of October 1, on the common administrative procedure of public administrations (hereafter, LPAC) expressly provides for the possibility that the competent body, before agreeing to the start of an administrative procedure, can open a period of prior information with the purpose of knowing the circumstances of the specific case and the convenience or not of starting the procedure (article 55).

In the specific disciplinary area and for the purposes that concern them, article 275 of Decree 214/1990, of July 30, which approves the Regulation of personnel in the service of local entities, provides that the competent body may order, prior to the start of a disciplinary case, the production of confidential information.

These investigative actions are fundamentally aimed at determining, with the greatest possible precision, the facts likely to motivate the initiation of the procedure, the identification of the person or persons who may be responsible and the relevant concurrent circumstances.

It is a consolidated jurisprudential criterion that the investigation phase prior to the start of a sanctioning or disciplinary procedure does not properly constitute an administrative procedure (among others, STSJM 471/2006, of May 24), as well as that its reserved nature (its knowledge can lead to clear damage to the result of the same) prevents access to its content during its processing (among others, STS 21/2018, of February 15). And this affects, even, the person who is being investigated (among others, STSJC 1212/2005, of November 25), as would be the case of the person making the claim.

Along these lines, the LTC expressly establishes the possibility of limiting or denying access to public information if its knowledge or disclosure entails a detriment to the investigation or sanction of the criminal, administrative or disciplinary offense in question (article 21.1.b)).

It is stated in the file that, in the present case, the corresponding legal report is still being drawn up in order to issue the corresponding resolution and close the reserved information.

In view of this, while the aforementioned prior information is being processed, its reserved nature must certainly prevail and the person making the claim has no right to access its content. This includes both the information about you contained in this reserved information, despite what is established in article 15 of the RGPD, and that other information referred to third parties, specifically that referred to the origin of the information, also included in article 15 of the RGPD.

However, it should be borne in mind that, based on the information available, in the case at hand a provisional measure has been adopted during the reserved information phase, consisting of the suspension of functions. Article 56.2 of the LPAC expressly provides for this possibility, as well as the right of interested parties to file appeals against the agreement to start the procedure where these measures are confirmed. If so, the right of defense of the interested person would justify access to information that may be relevant for the purposes of exercising this right, as we will see in legal basis V of this report.

Once this phase of investigation concludes, it may lose its reserved or confidential character (STSJM 471/2006, of May 24). In the present case, this moment must have already occurred, taking into account that a provisional measure has been adopted and that, in accordance with article 56.2 of the LPAC, this measure must be confirmed within the deadline of 15 days in the initial agreement.

From this moment, and in the absence of a rule with the rank of law that limits access under the terms of article 23 of the RGPD, the person making the claim would have the right to access all the information on their person appear in the information provided or generated in the course of the previous information.

This, it should be noted, would include not only the direct information about your person that the City Council was dealing with but also the origin of the information and any communications that had been made or that were expected to be made, and the rest of the aspects which provides for article 15 of the

Taking this into account, and the view of the information that could be contained in the reference file, the person claiming, once the reserved information is concluded, should be able to access the information referring to the facts, conduct or attitudes that are attributed to him both in the statements made on the day by the minor's parents as in the subsequent written complaint, as well as in the various acts of declarations made by the people who could have intervened as witnesses in the course of the investigation.

This access could even include the identity (name and surname) of the person or persons who have provided said information to the City Council, given that this information would be part of their right to know the origin of the data

In the present case, and due to the information available, this could involve knowing the identity of the complainants, the child's parents, and also the identity of the rest of the classmates in the kindergarten, or even other parents, summoned to testify as witnesses and who have provided information about the person exercising the right of access.

With regard to the identity of the complainants, taking into account the nature of the facts that they attribute to the complainant and the consequences that have arisen for him (the file states the adoption of the provisional measure of suspension of the claimant's employment) or that could still be derived, whether or not the disciplinary proceeding is instituted, it would not appear that the claimant's access to this identifying information should be limited. This, unless there was some element that, depending on the personal situation of the complainants, should lead to a limitation of this access.

With regard to the identity of the other persons summoned to testify, it cannot be overlooked that the right of access to said information may conflict with the right to data protection of these persons.

It should be borne in mind that the reserved nature of this type of investigation means that the people who declare or provide information about this type of investigation do so in confidence that, without prejudice to the access necessary to guarantee the right of defense of the persons responsible, may their identity be preserved.

According to the information available, in this case they would have been summoned to declare all the workers of the municipal kindergarten where the claimant provides or, until the time of the beginning of the reserved information, provided their services. These are people from the same work environment, predictably most direct colleagues of the person making the claim, and the disclosure of what they may or may not have said regarding the facts attributed to the person making the claim could end up negatively affecting the labor relations of 'th

As for the rest of the parents who use the nursery, the only thing that is known is the Council's desire to gather their opinion, by calling them to a meeting about it. However, there is no information in the file sent regarding the people present or the nature of the demonstrations that, if applicable, they could have made about the controversial events in said meeting.

It is particularly relevant, in cases like the one proposed, to comply with the hearing procedure provided for in article 31 of the LTC, for the purposes of knowing if there are personal circumstances or reasons that could justify preserving the identity of these people.

Unless these people allege specific circumstances that allow a clear prejudice to be assessed by the fact that the claimant can access their identity, the claimant's access to this identifying information should not be limited either.

Beyond this access carried out under the protection of what is established in article 15 of the RGD, once the reserved information is concluded, the regime applicable to access to other personal data of third parties will depend on its result, that is if it is agreed to file the investigative actions carried out or the start of the disciplinary procedure. This forces us to examine both sc

IV

In the event that the previous information has concluded with the filing of the actions, access to third party data that may be contained in the corresponding file will be governed by the criteria established in articles 23 and 24 of the LTC.

Article 23 of the LTC states that "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 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 party expressly consents to it by means of a written document that must accompany the request."

Based on the information available, in the present case the reserved information would have started when two female employees of the municipal kindergarten became aware of facts that could constitute the commission of a disciplinary infraction. It cannot be ruled out that, as a result of the account of these disputed facts by the complainants, the documentation that is part of the reserved information corresponding to the complainant could also include the identification and other information about the performance of the other investigated worker.

From the perspective of data protection, despite the fact that the previous actions end with their archive and no disciplinary procedure is initiated, the information about the persons reported or investigated is considered information related to the commission of disciplinary infractions. It should be borne in mind that the mere fact of providing information about a person who has been investigated for facts that could constitute a disciplinary offense could cause serious damage to the privacy of the person affected, particularly in regard to the nature of the facts investigated. This means that, despite the doubt that may arise regarding its inclusion in the access regime of article 23 of the LTC - because the disciplinary procedure has not been initiated -, a reasoned weighting between the different rights and interests at stake that would need to be done in accordance with article 24.2 of the LTC, would also oblige us to take into account this circumstance that could lead to a denial of access to this information.

In the event that the archive of the reserved information has taken place, it does not seem a priori that said information was necessary for the exercise of the right of defense of the person claiming, so it should be omitted of access

On the other hand, the reserved information requested seems to contain other information deserving of special protection, mainly data relating to health (articles 4.15 and 9.1 RGD) regarding a particularly vulnerable group (minors), taking into account that the facts investigated are related to an alleged inappropriate behavior in the care of one

minor from the municipal kindergarten who, according to the information available, would have caused him some injuries. In addition, it cannot be ruled out, in view of the report issued by the Mayor on the claim, that it contains the report issued by the doctor who treated the minor at the request of his parents.

If the archive of reserved information has taken place, access to this type of information by the person claiming should be denied on the basis of what is provided for in article 23 of the LTC.

Apart from this information, the previous information will also contain information about the people who have intervened in the tasks assigned to them.

Article 24.1 of the LTC provides that:

"1. Access to public information must be given if it is information directly related to the organization, operation or public activity of the Administration that contains merely identifying personal data unless, exceptionally, in the specific case it has to prevail over the protection of personal data or other constitutionally protected rights."

In principle, in accordance with this precept, there should be no inconvenience in providing the person making the claim with the merely identifying data (name and surname, and position) of the persons responsible for the processing of the reserved information (in the present case, at least the councilor for education, instructor of the investigation procedure).

v

In the event that disciplinary proceedings have been instituted against the claimant and it has been agreed to incorporate the reserved information, it must be taken into account that the access request will be governed by the provisions of common procedure legislation, when holding the person claiming the status of interested person (article 4 LPAC).

The first additional provision of the LTC establishes that "the access of the interested parties to the documents of the administrative procedures in progress is governed by what is determined by the legislation on legal regime and administrative procedure."

Article 53.a) of the LPAC provides that interested persons have the right to access and obtain copies of the documents contained in the procedures in which they have this condition.

For its part, article 26 of Law 26/2010, of August 3, on the legal regime and procedure of the public administrations of Catalonia, also establishes that "citizens who have the status of persons interested in a administrative procedure in progress have the right to access the file and obtain a copy of the documents that are part of it. If the documents are in electronic format, citizens have the right to obtain electronic copies."

The applicable administrative procedure legislation recognizes the right of interested persons to access the information contained in the procedure and to obtain copies of it in fairly broad terms. On the other hand, the interested parties have the right to use the resources provided for by the legal system regarding the administrative decisions that affect them.

This does not mean, however, that this right of access is an absolute right. It should be borne in mind that if it comes into conflict with other rights, as in this case it could be the fundamental right to the protection of personal data (Article 18.4 CE), it will be necessary to weigh up the different rights at stake, in order to decide which must prevail and to what extent.

This is, in fact, recognized by article 82.1 of the aforementioned LPAC by establishing that the obtaining of copies or access to the file of the persons interested in the hearing procedure must take into account the exceptions provided for in the transparency legislation.

In the same vein, article 51 of Law 26/2010, in regulating the hearing procedure, establishes that the possibility of accessing the file by interested persons will not affect "the data excluded from the right of "access".

In the present case, as we have seen, the information requested by the person making the claim is likely to contain data relating to the health of the minor involved in the events reported, either in the letter of complaint submitted by the holders of parental authority or in the report drawn up by the doctor who treated the minor, in case this had been provided with the written complaint or in the context of the previous investigation.

Article 9.1 of the RGPD establishes:

"1. The processing of personal data that reveal ethnic or racial origin, political opinions, religious or philosophical convictions, or trade union affiliation is prohibited, and the processing of genetic data, biometric data aimed at uniquely identifying a natural person, data relating to the health or data relating to the sexual life or sexual orientation of a natural person."

Along these lines, article 23 of the LTC only allows access to health data when the consent of the affected persons is available. Despite this, article 15.1 of Law 19/2013, of December 9, on transparency, access to public information and good governance (LT), also allows access to this type of data when it is covered by a rule with rank of law.

Considering that the primary purpose of the right recognized in the aforementioned article 53.a) of the LPAC (and in similar terms to article 26 of Law 26/2010) is to guarantee the right of defense (article 24.1 EC and 53.1.e) LPAC) of the person interested in the procedure, in order to admit the claimant's access to the information deserving of special protection from third parties that may be included in the requested information, it would be necessary that this information relevant to the exercise of his right of defence.

In this regard, it should be noted that, in view of the nature and seriousness of the facts attributed to the claimant (which could even constitute a criminal offence), it can be understood that, for the purposes of exercise their right of defense satisfactorily, it might be relevant to have or know certain information about the child's health, such as the type and location of the injuries that the complainants claim the child had, the authorship of which attributed to the claimant.

Beyond this, the RGPD requires that any data processing that is carried out (such as access) is limited to the minimum data necessary to achieve the intended purpose of this processing (Article 5.1.c), regarding the principle of data minimization). Therefore, in case

other data relating to the minor's health were contained in the requested information, it would be necessary, in order to grant access, to prove the relevance of this type of specially protected information for the exercise of the right to defense of the claimant.

It could also contain, as we have seen, information relating to the commission of an administrative offense by someone other than the person making the claim, in respect of which the Spanish legislator has been establishing a reinforced system of protection. Proof of this is the LTC itself (Article 23).

With regard to the information relating to the possible commission of disciplinary infractions by the other employee of the municipal kindergarten that could be included in the reserved information, it seems that in the present case the identity of this other employee under investigation (first and last name) could be known to the person making the claim. From the report issued by the Mayor on the present claim, it seems clear that both workers were involved in the same events reported by the parents of the minor affected. It is also stated in the file sent that the two workers share the same representative in their actions before the City Council and the GAIP.

Given this, in the specific case raised, the disclosure of this information to the person making the claim does not seem to have particular relevance with regard to the right to the protection of personal data of the other person being investigated, taking into account the link between the alleged conduct of the two people involved and the relevance this may have in their defense strategy.

In relation to the merely identifying data (name, surname and position) of the people who have intervened in the reserved information, there would be no inconvenience in providing them, given that the knowledge of this data by the person making the claim would be protected in the LPAC, which recognizes citizens the right to identify the authorities and personnel serving the public administrations (article 53).

Conclusions

The person claiming does not have the right to access the content of the information reserved prior to the initiation of a disciplinary procedure against him while it is being processed, despite the right of access to his own data in article 15 of the 'RGPD.

Once concluded, the person making the claim has the right to access all the information about them that appears in the information provided or generated in the course of the reserved information, including the identity of the people who provided said information, except for those cases in which the circumstances alleged by these people make it advisable to preserve their privacy.

If the actions have been archived, the person making the claim also has the right to access the merely identifying data of the instructing person. Not so for the information relating to the other person under investigation or that relating to the health of the minor involved in the reported events that may be included.

However, if disciplinary proceedings have been initiated, the person's right must be recognized

claiming to access relevant information for the exercise of his right of defense in the terms indicated in FJ V of this report.

Barcelona, April 3, 2020

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