

IAI 24/2020

Report issued at the request of the Commission for the Guarantee of the Right of Access to Public Information in relation to the claim for the denial of access to the remuneration of a specific person derived from his participation in communication programs of a body public or in programs of production companies contracted by this public body

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 by a citizen against a public body, for denial of access to certain information related to the remuneration received by a certain person as a result of their participation in programs of the public body and of the production companies contracted by the public body during the period between 2009-2019.

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 January 16, 2020, a citizen presents a letter to a public body in which she makes the following request:

"List of remuneration for (...) by any of the companies of the public body in the period 2009-2019, for any concept derived from their participation in programs of the public body or of the contracted production companies by this public body throughout this period.

The report must include, for each year:

- Name of the program or space in which it takes part.**
- Type of collaboration (participation in social gatherings, fixed section, etc.).**
- Number of collaborations carried out.**
- Perceived amount."**

2. On February 27, 2020, you are notified of a resolution that partially approves the request for access to public information in the following terms:

"4. The public entity appreciates the request regarding the remuneration paid by the public entity to Ms. (...) whenever this information is in your possession; that Ms. (...) has not objected to access; and that in the contracts formalized between it and the public body, provision is made for the power of the public body to publish the data of the contract on the Transparency Portal of the public body.

These remunerations are those listed in the PDF document attached to this resolution, which indicates the date of the collaboration contract, number of participations, estimated amount, amount actually received and concept of the intervention.

5. In relation to the remuneration that Ms. (...) perceives from the production companies that the request made by the interested party must be rejected to the extent that this information cannot be considered public information whenever the public entity, for the reasons mentioned above, does not have this information. It must also be noted that the request for information made by the interested party goes substantially beyond mere access to public information, which has no protection in the right of access to public information, whenever the duty of publicity active provided for in LAW 19/2014, of December 29, on transparency, access to public information and good governance, in relation to remuneration refers to remuneration, compensation and per diems received by public employees. In this sense it must be said that Ms. (...) she is not an employee or worker of the public body, nor does she perform any function in society.

Finally, it must be said that remuneration is personal data protected by data protection regulations which means that, in general, respect for data protection and privacy must prevail. In this sense, and despite the public entity disposing of the remuneration received from the production companies, in order for the public entity to be able to publish these remunerations and/or facilitate them to third parties, it would be necessary to obtain the prior consent of both Ms. (...) like production companies."

3. On June 11, 2020, the applicant submits a claim to the GAIP against the public entity for the partial estimate of the delivery of the requested public information.

4. On September 21, 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.

5. On October 5, 2020, the GAIP sent this Authority new documentation in relation to this claim. These are, in particular, written statements of objections from audiovisual production companies to the access claim, in which they state, in summary, that they are not obliged to supply the remuneration information requested for not being treated of information subject to Law 19/2014, of December 29, on transparency, access to public information and good governance.

There is also documentation that certifies that the public body has carried out the transfer of the claim to the people whose rights may be affected by the access subject to the claim.

Legal Foundations

I

In accordance with article 1 of Law 32/2010, of October 1, of the Catalan Authority of Data Protection, the APDCAT is the independent body that aims 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, understood as any information about an identified or identifiable natural person, directly or indirectly, in particular through an identifier, such as a name, an identification number, location data, an online identifier or one or more elements of physical, physiological, genetic, psychological, economic, cultural or social security of this person (article 4.1 of Regulation 2016/679, of April 27, 2016, relating to the protection of natural persons with regard to the processing of personal data and the free circulation of such data and by which repeals Directive 95/46/EC (General Data Protection Regulation, hereafter 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

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.

The LTC extends its subjective scope of application, among others, "to public law entities dependent or linked to the administrations referred to in letter a" (article 3.1.b), which includes the Administration of the Generalitat.

According to the Law (...) it is an entity under public law, with its own legal personality and full operational autonomy, attached to the Administration of the Generalitat through the competent Department (...). Therefore, the public body is fully within the scope of application of the LTC.

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".

This right of access, 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 LTC), and the principles of the personal data protection regulations.

III

The purpose of the access is, as can be seen from the statements of the person making the claim, to know the remuneration received by a certain person due to his participation, during the period that includes the years 2009 to 2019, in programs of the public body or the production companies contracted by the public body throughout the aforementioned period.

This information is requested with the following level of detail:

- Name of the program or space in which it takes part.
- Type of collaboration.
- Number of collaborations carried out.
- Amount perceived.

As can be seen from the file sent, the public body would have given the person claiming information about the remuneration received by that person in relation to the programs

which are of the entity's own production, that is to say, programs produced entirely with the technical and human resources of the public entity.

Specifically, the public body would have delivered a document (in pdf format) containing the following information fields: reference to the collaboration contract, date of the contract, validity of the contract, estimated amount, amount actually received, number of collaborations and description of the intervention.

On the contrary, it would not have handed over to the person making the claim, as this was information that the public body would not have, the remuneration received by this person in relation to programs that are partially or entirely produced by audiovisual production companies contracted by the we public

In the resolution of the request for access, the public entity also points out that, despite the entity being able to dispose of the remuneration received from the production companies for this person, in order to be able to provide it to third parties it would be necessary to obtain the prior consent of both the affected person and the production companies.

From here, the person making the claim considers that the information provided by the public body does not correspond to the information requested. In this regard, he claims that "the information on the management of resources that the public body transfers to the production companies it hires must be considered public information. The producers themselves, like any private company contracted by the public administration, must justify in detail the use of the public funds they receive for the performance of their activity (...). The information on the remuneration of collaborators is an essential part of this information."

Given this, it is appropriate to examine whether the retributive information requested by the person making the claim in relation to the person who collaborates in programs produced by the production companies contracted by the public entity must be understood as public information for the purposes of the LTC and therefore subject to the right of access (article 18 LTC). If this is the case, it is necessary to examine whether or not the fundamental right to the protection of personal data would justify a limitation of the right of access of the person making the claim to said information.

IV

As seen, article 18 of the LTC declares the right of access to "public information" in relation to the content given to this concept in article 2.b) of the same law: "the information prepared by the Administration and which it has in its possession as a result of its activity or the exercise of its functions, including that supplied by the other subjects obliged in accordance with the provisions of this law".

Administration means "public administrations and bodies, public bodies and instrumental bodies of the public sector and entities linked to the Administration referred to in article 3.1.a,b, ic, and the other bodies and public institutions included in article 3.1.b." (article 2.f) LTC). Therefore, the public entity falls within this concept of Administration for the purposes of the LTC.

From these precepts it follows that the right of access can be exercised in relation to all the information that is materially in the hands of the public body, regardless of the date it was prepared and the temporary references that may be there in its content. Information (so documents

and also data) in its possession either because it has been prepared by itself, because it is the result of its activity or the exercise of its functions, or because it has obtained it from other subjects in attention to the obligations that the LTC imposes on them in terms of transparency.

It must be taken into consideration, in this last sense, that according to article 3.1 of the LTC this law is not only applicable to public administrations and their instrumental bodies, to statutory institutions and public law corporations (to which refer to letters a), b), ic) of this same article 3.1 LTC) but also:

"d) To natural or legal persons who exercise public functions or administrative powers, who provide public services or who receive public funds to function or to carry out their activities for any legal title. e) To natural or legal persons who carry out activities legally qualified as services of general or universal interest."

However, article 3.2 of the LTC provides that, in these cases (those of sections 1.d) and i) mentioned), "the compliance with the obligations established by this law must be made effective by the responsible Administration", which in a case like the one examined would be the public entity.

In order to enable the fulfillment of these legal obligations, the same article 3.2 of the LTC imposes on these subjects the obligation to inform the responsible Administration about (only) "the activities directly related to the exercise of functions public services, the management of public services and the collection of public funds, and of the activities that remain within the supervision and control of the Administration in the case of services of general or universal interest", as well as on "the remuneration received by (its) managerial positions" only when "the volume of business of the company linked to activities carried out on behalf of the public administrations exceed twenty-five percent of the general volume of the company".

From the information available, it does not appear that the production companies affected by the request for information in the present case (which the public body identifies in the file sent to the GAIP) could be considered subjects subject to the transparency obligations of article 3.2 of the LTC.

A priori these are legal entities that are governed by private law, whose corporate object is the production of all types of audiovisual formats in exchange for a consideration for production activities and for the transfer of exploitation rights and intellectual property - in this case, in favor of the public body - of the programs and audiovisual content they create.

It does not seem, therefore, in terms of article 3.1.d) and e) of the LTC, that it is a question of legal persons that exercise public functions or administrative powers, that provide public services or that carry out activities legally qualified as to services of general or universal interest. It is also not known that, beyond the consideration for the services contracted to them, these production companies receive public funds to operate or to carry out their activities by any legal title.

That being the case, it cannot be said that we are dealing with subjects who fall within the scope of application of the LTC (article 3.1), nor therefore that the law (article 3.2 LTC) imposes an obligation of collaboration on them with the responsible administration (...), so that it, which is the one that is intended to be controlled and which is legally and politically accountable to the public, can fulfill its obligations of transparency, whether active advertising or those derived from right of access to public information

That is to say, that, for these purposes, said production companies would not be obliged to hand over to the public body - nor could the public body require them - the remuneration information of the people who collaborate or participate in the programs that they produce themselves.

If so, since it is not information in the possession of the public entity, it could not qualify as "public information" in the terms of article 2.b) of the LTC nor, therefore, as information that remains subject to the right of access of article 18 of the LTC.

Even in the event that it could be considered that said production companies are obliged subjects for the purposes of the LTC (for example, in the case of receiving public funds to operate or to carry out their activities for any legal title (article 3.1.d) LTC)), nor could it be said that they are obliged to deliver such information to the public body.

In these cases, as we have seen, the LTC (article 3.2 in fine) would only oblige them to hand over to the public entity "the remuneration received by (their) managerial positions if the business volume of the company linked to activities carried out on behalf of the public administrations exceeds twenty-five percent of the general volume of the company", not so the remuneration received by the rest of its non-managerial staff, among which the affected person would be found for the information request of the person making the claim.

In view of these considerations, it can be concluded that the claimant would not be able to access the requested remuneration information in accordance with the transparency regulations. Even in the event that the public entity disposes of this information, in view of the transparency regulations, a limitation of the right to the protection of personal data would be unjustified, given that the same transparency regulations already provide for cases like the one analyzed, in terms of remuneration, the subjection to the law of transparency only with regard to the remuneration of its managers, as long as they exceed a certain threshold. It is not known that neither one nor the other condition is met in the case at hand.

In any case, point out that access to this information, from the point of view of data protection, could be understood as legitimate in the event of any other of the legal bases established in article 6.1 of the RGPD other than the relevant to the fulfillment of a legal obligation applicable to the data controller (section c)). This could be the case, for example, of the consent of the affected person (Article 6.1.a) RGPD).

Having said that, taking into account that the purpose of the access request is the control of the destination of public funds by the public body, as well as that the LTC obliges the public body to publish on its Portal of Transparency information on "contracts signed, with an indication of the object, the tender and award amount, the procedure used to contract and the identity of the successful tenderer, the duration, the number of tenderers, the award criteria, the comparative table of offers and the respective scores, and also the agreements and technical reports of the contracting process" (article 13.1.d)), there would be no drawbacks, from the point of view of protection of data, to give the person claiming this information in relation to the commission contracts that the public body formalizes with the production companies.

conclusion

Since the information on the remuneration that a certain person receives from the production companies contracted by the public body as a result of their participation in programs or spaces produced by these companies is not part of the information to which it applies the regime of transparency legislation, the limitation of the right to data protection would not be justified. Consequently, the delivery of the requested information cannot be protected by transparency legislation, without prejudice to the fact that it can be protected by some other legal basis, such as the consent of the affected person.

Barcelona, October 7, 2020

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