

Ref.: IAI 30/2020

Legal report issued at the request of the Commission for the Guarantee of the Right of Access to Information Public in relation to the claim submitted by a citizen to a city council for the denial of access to information relating to health inspections in the municipality's premises between 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 a city council for the denial of access to the information on the data relating to the health inspections in the premises of the municipality between the years 2016 and 2019.

Having analyzed the request, which is accompanied by a copy of the file of the claim submitted, in accordance with the report of the Legal Counsel, the following is reported:

Background

1. On January 29, 2020, a citizen submits a request for access to public information to the City Council in which he requests:

"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 (colleges, universities, major colleges, institutes, nurseries...) and other restaurants or food establishments in the city (any type of establishment or place with its activity heading that the council carries out hygienic-sanitary inspections and that the establishment distributes food to the final consumer) between January 2016 and June 2019, both months included.

I ask that the information for each inspection include: type of premises where it has been done (bar, restaurant, discotheque...), number of the premises, CIF of the company or person who manages the premises, 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 carried out if not, result of the inspection (favorable, favorable conditioned, unfavorable, suspended, approved...), the deficiencies, infractions or non-compliance found detailed all of them in the most specific existing category, the score obtained in the rating system of the municipal inspections that are carried out at the highest level of breakdown, the risk or frequency with which that premises is categorized for future inspections, if the inspections have proposed sanctions to that premises, if they have ended having them and which ones they have been (date, reason and amount). In the same way, I request to know the number of premises closed by the City Council, the date on which it was closed, the reason and the number and address of the premises.

I am also requesting a copy of the inspection protocol for this type of premises (bars, restaurants and other catering premises) by the City Council."

2. On February 25, 2020, you will be notified of a resolution that partially approves the request, in the following sense:

"The City Council (...) has participated since its first edition (2009) in the "Intermunicipal Comparison Circle. Application in the field of Food Safety" organized by the Provincial Council (...). In the context of these circles, the annual data on the inspection and control activities of the city's food establishments. In the following link you have all the information related to the aforementioned circles, as well as the data that is published annually open to the general public (...).

Anyway, I am attaching the specific data from the City Council (...) relating to the years 2016, 2017 and 2018. In relation to the data from the year 2019, they are collected annually once the financial year has ended.

Also remind him that the information related to the files related to the inspection activities in the field of food safety can be consulted by the general public in the offices of the Health Service (...).

3. On June 12, 2020, the interested party submits a claim to the GAIP against the City because he considers that it has not given him the information as requested and reiterates his request for the following reason:

"The City Council provides the total aggregated data of the inspections and of the city's restaurant establishments, but it does not provide what was really requested, which are the detailed results of each and every inspection in each and every one of the establishments of the city (...) In addition, the City Council has provided aggregated and total data from the inspections. Therefore, it is obvious that they have the detailed data, without which they could not have the total data".

In addition, it requests the mediation procedure provided for in article 42 of Law 19/2014, of December 29, on transparency, access to public information and good governance.

4. On June 22, 2020, the GAIP requests a report from the City Council in relation to the claim made by the person making the claim.

5. On July 7, 2020, the City Council responds to the request made by the GAIP.

6. On September 3, 2020, the first mediation session is held in which the parties confirm that the agreement is not possible, so that the mediation procedure must be resolved by resolution of the Plenary of the GAIP.

7. On October 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 governance, in relation to the claim presented.

Legal Foundations

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 opinion 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 18.1 of Law 19/2014 establishes:

"People have the right to access public information, referred to in article 2.b, on an individual basis or in the name and representation of any legally constituted legal entity".

The aforementioned article 2.b) defines "public information" as:

"The information prepared by the Administration and that 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 what is established this law".

In this sense, the information related to the hygienic-sanitary inspections carried out in premises and/or catering establishments including, as stated by the person making the claim, any type of premises where food is distributed to the final consumer, carried out by the City Council between January 2016 and June 2019, both inclusive, is information that must be considered public for the purposes of article 2.b) of the LTC and, therefore, 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 regulations personal

III

The City Council would have given the person making the claim the following information:

- A database, with the number of food establishments registered, visited, inspected, precautionary measures, warnings, complaints and requirements and sanctioned in the municipality during the period 2016 to 2018.
- A link to a web page of the "Intermunicipal Comparison Circle. Application in the field of food safety" organized by the Provincial Council.
- The possibility of consulting the physical files, in person, in the offices municipal

The claimant considers that the information provided is partial and does not correspond to the information requested. In this sense, he alleges that "the City Council provides total aggregated data from the inspections and from the city's restaurant establishments, but it does not provide what was really requested, which is the detailed results of each and every inspection in todos y cada uno de los establishments de la ciudad(...) In addition, the City Council has provided aggregated and total inspection data. Therefore, it is obvious that they have the detailed data, without which they could not count the total data" without explaining the reasons why they need 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 specially 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 public reprimand infringer, unless the affected party expressly consents by means of a written document that must accompany the request."

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 can 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, in line with the criterion supported by the Authority in previous reports, among others, IAI 4/2019 and IAI 45/2019, 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 affects, in principle, the commercial interests

economic interests 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 its social image - remember that the offender is the entrepreneur or owner of the business regardless of the commercial name that the establishment may use -, 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 individual entrepreneurs, 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 other citizens may have.

On the other hand, mention that in the mediation minutes of the GAIP, of September 3, 2020, it is indicated that the interested party is a journalist. In this regard, it must be said that the claimant does not rely on this condition to access the public information he claims before the GAIP. But 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, since other elements established by the regulations will have to be taken into account of access to public information, in particular, in the case that deals with the provisions of article 23.

IV

In the case in question, some information is requested that may allow the affected persons to be identified directly (name of the business) or others that may allow it to be identified indirectly (NIF, address of the premises, etc.)

In this sense, consideration must be given to Recital 26 of the RGD, which 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 RGD provides:

"An identifiable natural person will be considered any person whose identity can be determined, directly or indirectly, in particular by means of an identifier, as per

ejemplo 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.”

Therefore, 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 detailed information requested by the claimant regarding the inspections and violations committed, among other data, the CIF of the company or the address of the premises may make it possible to identify the persons responsible, indirectly

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.

It should also be noted that 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 been initiated, 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 documents contained in the file, specifically, the database of the Intermunicipal Comparison Circle of the Provincial Council in the field of food safety, and by way of example, only in the year 2018 978 inspections would have been carried out in the 3,401 existing food establishments in the municipality, 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.

In accordance with the above, and since it is not known that there is a sectoral law that provides for the publication of the sanctions imposed, it is concluded that article 23 LTC must lead to the exclusion of access to information data requested to link, either directly or indirectly (through the NIF, the address or other information that allows to end up identifying the natural persons owning them), the inspections with the natural persons owning the businesses to which did the inspection or that they were sanctioned.

However, this does not prevent the delivery, as requested by the applicant, of disaggregated information on the result of each inspection, as long as it cannot be linked to the physical persons affected, through a prior anonymization process.

conclusion

Data protection regulations only allow access to the requested information in a disaggregated manner. The information can only be delivered in a disaggregated manner if it is previously anonymised.

Barcelona, November 2, 2020

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