Ref.: IAI 36/2020

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 against the denial by a Department of the Generalitat of a citizen's request for access to a list of deputies of the Parliament of Catalonia with security provided by the Department in the last five legislatures

The Commission for Guaranteeing the Right to Access to Public Information (GAIP) asks the Catalan Data Protection Authority (APDCAT) to issue a report on a claim, submitted in relation to the denial by a Department of the request for access by a citizen to a list of deputies of the Parliament of Catalonia, with security provided by the Department in the last five legislatures.

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 October 7, 2020, an access request addressed to a Department is submitted in which:

"The number of each and every member of Parliament who have had security provided by the Department (...) or the Generalitat de Catalunya in general. I request that this information be provided for the last five legislatures and that it be broken down for each and every one of those five legislatures. I also request that, for each member of parliament and legislature, the reason for providing security and whether it was done through the Mossos d'Esquadra, another police force or private security. I remind you that this is information considered of interest and public access by the Consejo de Transparency y Buen Gobierno state and that there is no limit to not handing it over, as the Council has dictated in Resolution 082/2020".

2. On November 9, 2020, the Department, (...) communicated in writing the denial of the access request. In this letter he states the following:

"
The Police of the Generalitat-Mossos d'Esquadra (PG-ME) provides and has provided protection to those public officials of the Autonomous Community of Catalonia who, due to the responsibility of the position they hold and after the corresponding operational analysis, are assessed to have a potential security risk. This protection is not foreseen or regulated in any provision

specific regulations, and is carried out based on the powers that the PG-ME has as a comprehensive police force.

In this sense, during the last five legislatures the PG-ME has given personal protection to the presidents of the Generalitat de Catalunya, to the presidents of the Parliament, and to the members of the Government, due to the risk inherent in the responsibility, exposure and vulnerability of the positions they represent. Likewise, protection has been given to some of the presidents of the different parliamentary groups, who also carried the same risk assessment for their security. In the same way, the PG-ME can grant protection to other members of Parliament regarding whom it is operationally assessed that there is a risk to their security.

[…] the Directorate General of the Police cannot provide data on the specific risk assessments it carries out regarding the different elected positions to which it provides protection, nor regarding the specific deputies to whom they have been provided or is currently provided, given that said information can affect the security of both those to whom it is provided and those who are not.

In this sense, it is considered that the request [...] must be denied given that it falls within the limit included in article 21.1 a) and 23 of Law 19/2014, insofar as it could involve the disclosure of personal data included in article 23, since it is requested not only the identification of the deputies to whom a protection service is provided or has been provided, but also the reasons for which it has been given, data that can be especially protected In the same way, the aforementioned request would involve providing information whose disclosure could also affect the organization and effectiveness of the actions, to the extent that they would reveal which police actions are being carried out and which ones are not, potentially putting the deputies at risk, to the police officers who develop it and the public security itself.

In short, providing the information would mean making public information related to the organization, methods and evaluations of the operatives destined to protect the aforementioned personalities. That is, data would be revealed that could expose vulnerabilities or facilitate the organized preparation of criminal actions against said persons or reduce the effectiveness of the corresponding police measures. […]"

3. On November 10, 2020, the citizen submits a claim to the GAIP in which he reiterates the request in the same terms as he made to the Department.

4. On November 12, 2020, the GAIP sent the claim to the Department, requesting a report that sets out the factual background and grounds its position in relation to the claim, as well as the complete file and, if applicable , specify the third parties who are affected by the claimed access, as well as the person or persons who will represent them at the mediation session requested by the citizen.

5. On November 25, 2020, the GAIP addresses a request for a report to this Authority, in accordance with the provisions of article 42.8 of Law 19/2014, of December 29, on transparency, access to public information and good governance.

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, 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, in accordance with the provisions of article 3.1 of Directive (EU) 2016/680 of the Parliament and of the Council of April 27, 2016, relating to the protection of natural persons with regard to processing of personal data by the competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offenses or the execution of criminal sanctions, and the free circulation of such data and for which Framework Decision 2008/977/ JAI of the Council is repealed (before Directive (EU) 2016/680). This Directive has not yet been transposed into the Spanish legal system.

Therefore, any other limit or issue that does not affect the personal data contained 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

In accordance with the provisions of articles 2 and 3.1) of Directive (EU) 2016/680, this Directive applies to the treatments carried out by the competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offenses or

of execution of criminal sanctions, on any information "on 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".

For these purposes, article 6.c) of the Directive provides, among other things, that it is considered as a category of interested parties the "victims of a criminal offense or persons respecto de las cuales determinadas fechos den lugar a pensar que puedan be victims of a criminal o

Therefore, the processing of data of people who are provided with a security service by the competent authorities in matters of public security as a preventive measure against possible crimes that they may suffer is governed by Directive (EU) 2016 /680 and, more specifically, by the regulation that transposes it.

However, Directive (EU) 2016/680 has not been transposed into the Spanish legal system at the time of writing this report. In this sense, the fourth transitional provision of Organic Law 3/2018, of December 5, on the Protection of Personal Data and guarantee of digital rights (LOPDGDD) provides that the treatments subject to Directive (EU) 2016/680, continue to be governed by Organic Law 15/1999, of December 13 (hereafter LOPD) and in particular article 22, and its implementing provisions, until the rule that transposes into Spanish law the provisions of the directive enters into force mentioned

Taking into consideration that the citizen's claim is the communication by the Department of certain information that affects the deputies, article 11 of the LOPD provides that the personal data subject to the treatment can only be communicated to a third party for the fulfillment of purposes directly related to the legitimate functions of the assignor and the assignee with the prior consent of the interested party, unless the assignment is authorized by law. (arts. 11.1 and 11.2.a LOPD).

In relation to this provision, Law 19/2914, of December 29, on transparency, access to public information and good governance (hereafter, LTC) regulates and guarantees access to documents held by public authorities or bodies public In accordance with the provisions of articles 2.b) and 18 of the LTC, individuals, as individuals or in the name and representation of a legally constituted legal entity, are granted the right of access to information public, understood as such "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 other subjects obliged in accordance with the provisions of this law". State Law 19/2013, of December 9, on transparency, access to public information and good governance (hereafter, LT), is pronounced in similar terms, in its articles 12 (right of access to public information) and 13 (public information).

These forecasts, in addition, have a place in what is provided for in Recital 16 of Directive (EU) 2016/680, whereby its application "[...] is understood without prejudice to the principle of public access to official documents . According to Regulation (EU) 2016/679, the personal data that appear in official documents that are in the possession of a public authority or a public or private body for the performance of a task of public interest can be

divulged by said authority or body in accordance with Union or Member State law that applies to said authority or public body in order to reconcile the right of public access to official documents with the right to the protection of personal data."

In the case at hand, the information to which access is sought corresponds to the members of Parliament with security provided by the Department, in the last five legislatures (including the present one) and with the breakdown of each one. In particular, it is requested that with respect to each deputy and legislature, the reason for providing him with security and through which police force, or private security, is indicated.

Given the above, it can be concluded that this information must be considered public for the purposes of articles 2.b of the LTC and subject to the right of access (art. 18) as it is documentation that is in the possession of the Department as a result of the exercise of their powers. It must be noted, however, that this right of access is not absolute and can be denied or restricted for the reasons expressly established by law, as is the case with the limits of articles 23 and 24 of the LTC regarding personal data.

III

It is necessary to analyze first of all whether among the personal information requested there is any data from the categories to which article 23 of the LTC grants special protection.

Article 23 of the LTC provides 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, the 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."

According to the documentation in the file, the Department's resolution is based on the limits on access to public information provided for in articles 21.1.a) and 23 of the LTC, considering that the data to which the person claiming access would include data that may be of special protection to the extent that, in addition to the identification of the deputies to whom the need to grant them protection has been assessed, they are also requested the reasons that justified this and the person responsible for the provision. He considers that the communication of this data could affect the organization and effectiveness of police actions, since they would allow to deduce those that are not carried out and, consequently, compromise the safety of deputies, reveal vulnerabilities or facilitate preparation organized criminal actions directed at these people or reduce the effectiveness of the measures adopted.

In particular, it should be remembered that the person claiming is requesting access to information relating to the identification of the deputies of the last five legislatures, including the present one, to whom it has been agreed to provide the protection service at the expense of the Department , as well as the reasons that justified this protection and the police force responsible, or if it is provided or has been provided through private security.

With the information available, it does not appear that the information requested should include any of the categories of data referred to in Article 23.

Despite this, it is true that in the case of Members of Parliament, their identity can easily be linked to a certain political formation. And it is also true that in certain cases the information on the reason for which he is assigned security may contain information related to the political formation to which he belongs.

However, it should be borne in mind that in both cases the information about the political formation with which they are linked would be information that the affected persons themselves have made manifestly public when running for elections on the lists of a certain formation, with the which there would be authorization for the delivery of this information (art. 10.c) of the Directive and art. 15.1 LT).

Obviously, if apart from the political formation to which a Deputy belongs, the information to which it is intended to be accessed contained data that could be related there was or could be related to any other of the categories of data referred to in the 'article 23, should be excluded from access.

IV

Regarding other information, article 24 LTC should be taken into account. This article provides for the following:

"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.

2. If it is other information that contains personal data not included in article 23, access to the information can be given, with the previous reasoned weighting of the public interest in the disclosure and the rights of the people affected. To carry out this weighting, the following circumstances must be taken into account, among others: a) The elapsed time.

b) The purpose of the access, especially if it has a historical, statistical or scientific purpose, and the guarantees offered.

c) The fact that it is data relating to minors.

d) The fact that it may affect the safety of people."

It should be borne in mind that the identification data of the elected deputies are public data in accordance with the electoral legislation (Organic Law 5/1985, of June 19, on the general electoral regime) and furthermore, once proclaimed, their identification remains subject to the regime of active advertising which is particularly contained in Title VI of the Regulations of the Parliament, and in particular in article 211 which provides for the obligation to publish the organization of t

the Parliamentary Administration, as well as the CVs of the people proposed to occupy public positions whose appointment corresponds to the Parliament.

This regime operates without prejudice to the right of access to public information, and especially in relation to merely identifying data which, according to article 24.1 of the LTC, must be given access to the extent that the request is related to information related to the organization, operation or public activity of the administration, unless the protection of personal data or other constitutionally protected rights must prevail.

However, it must be borne in mind that the claimant's claim is not to know the merely identifying data, but those deputies to whom the Department has provided personal protection in the last five legislatures, including the current one, and the reasons that justified it as well as the responsible police force, or in its case, if it has been provided through private Consequently, the claim must be analyzed based on article 24.2 of the LTC, which requires the weighting between the interest in the disclosure of the information and the rights of the affected persons, understood as any right or freedom that may be affected by the disclosure of the information to which access is sought.

In accordance with the provisions of article 24.2 of the LTC, the weighting must be carried out in consideration of the elements that, for each particular case, may be relevant, such as, for example, the time elapsed with respect to the information requested, the safety of people or the purpose of access.

Regarding the purpose, article 18.2 of the LTC provides that the exercise of the right of access to public information is not conditional on the concurrence of a personal interest, nor is it subject to the allegation of a motivation or invocation of any rule. However, knowing the purpose or motivation of the request can be an important element to take into account in the weighting. In this specific case, the file does not state the motivation or purpose for which the data sought to be accessed are intended, for this reason this circumstance cannot be asses However, in accordance with the provisions of article 18.2 of LTC, this fact does not in itself prevent the exercise of the right of access to public information.

It is clear, as explained by the Department, that providing information about the deputies who have been provided with personal protection in the last five legislatures, the reason, and whether it has been done through a police force or private security can compromise their safety and also that of those to whom protection has not been provided. It can also reveal data relating to the functioning of police forces that could compromise operations.

It should be borne in mind that, although the person making the claim has not requested data relating to the type of operations, the personal resources allocated, or other details about the devices, the information may reveal and expose the lack of protection on some deputies, which could affect their security.

This affects in a very intense way the deputies of the current legislature, but it also affects the information about the security devices for the deputies of previous legislatures, since having information about the security devices existing in previous legislatures can provide information that may affect the effectiveness of current or future security devices.

Apart from these issues related to security, both of the deputies who have been assigned protection and those who have not, it should be noted that information about the reason for the establishment of security for certain deputies can offer information about aspects of his private life.

Except for the cases of the presidents of the Generalitat, former presidents and councilors of the Presidency, in which the regulations already foresee the need to guarantee their protection through the Institutional Security Area of the Department of the Presidency (seventh additional provision of the Decree 20/2019, of January 29, restructuring the Department of the Presidency) or other cases, such as the rest of the councilors or the presidents of the parliamentary groups, in which it follows from the Department's response that they already have assigned security generally due to the position, the establishment of security for other high officials and deputies remains subject to the assessment of the risk carried out by the Police of the Generalitat-Mossos d'Esquadra, in accordance with what the Department states in the its refusal resolution. This risk assessment can involve the analysis of many aspects of the MPs' lives, not only of their professional life but also of their private and family life.

Giving out this information can significantly affect your private and even intimate life.

Faced with this, the public can certainly have an interest in knowing the use of public resources and specifically the resources intended for the security of members of Parliament. As stated in the statement of reasons of the LTC, "In a context of a democratic state and the rule of law, all public authorities have the legitimacy given to them by citizen participation in their configuration (directly or indirectly), the which forces citizens to account, in accordance with the principle of responsibility, for their activity and the management of the public resources that have been made available to them.".

However, this control can also be carried out without the need to know the identity of the specific people to whom security service has been assigned, the reason why it has been done in each case and the type of security assigned.

The claimant alludes to his letter of claim before the GAIP that "this is information considered of interest and public access by the Consejo de Transparency y Buen Gobierno estatal and that there is no limit to not handing it over, as it has dictated by the Council in Resolution 082/2020". However, and aside from the fact that the criterion of this Authority is not subject to the criterion of that institution, it must be taken into account that that resolution is pronounced in relation to the questions raised in that procedure and, more specifically, to the inadmissibility of the request by the Ministry of the Interior considering that the information required a prior reworking action (article 18 LT). Consequently, the Council did not carry out an analysis in relation to the limit derived from the protection of personal data.

That being the case, the right to the protection of personal data should prevail over the right of access. From the point of view of data protection regulations, it could be sufficient for these purposes to be able to have information on the number of deputies who have enjoyed security, the general explanation of the allocation criteria (without being able to link with aspects of the lives of specific members of parliament) or the number of cases in which private security services have been used.

conclusion

It would not be in accordance with data protection regulations to provide information on the identity of the members of Parliament who have been assigned security in the last five legislatures, the reason for the assignment and the type of device (police force or private security) established in each case, given that this information can affect both the safety of the people affected and aspects of their private life and even their personal and family privacy.

Barcelona, December 17, 2020