

IAI 39/2020

Report issued at the request of the Commission for the Guarantee of the Right of Access to Public Information in relation to the claim presented by a trade union against a city council for the denial of access to the personal files of an administrative assistant and a social worker of the council

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 trade union against a city council, for denying access to personal records of an administrative assistant and a council social worker.

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 November 14, 2019, the union presented a letter to the City Council requesting:

"Access to the file of the administrative assistant of the OMIC whose contract has not been renewed and to the file of the social worker (...), who replaces her."

2. On January 20, 2020, the union, faced with the lack of response to its request for access to the requested public information, presents a claim to the GAIP against the City Council.

3. On January 31, 2020, the GAIP forwards the claim to the City Council, informing it of the processing of the mediation procedure at the express request of the complaining party, and requiring it to issue a report on which they base their positions, as well as the complete file relating to the request for access to public information, the identification of the third parties who are affected by the requested access, as well as the person or persons who will represent at the mediation session.

4. On June 12, 2020, the claimant union sent an email to the GAIP in which it withdrew its request for access to the City Council's social worker's file, having noted that she person did not replace the administrative assistant of the OMIC, whose contract was not renewed.

5. On November 12, 2020, the first session of the mediation procedure is held, regulated by article 42 of Law 19/2014, of December 29, on transparency, access to public information and good governance, without an agreement being reached between the parties on access to the claimed information.

6. On November 26, 2020, the claimant union, in response to a communication from the GAIP requesting clarification regarding the claim presented, sent an email to the GAIP through which it limited the subject of its claim to "the existing documentation in the file (of the OMIC worker) relating to the reasons and information regarding the failure to pass the probationary period."

7. On December 10, 2020, the GAIP requests this Authority to issue the report provided for in article 42.8 of Law 19/2014, of December 29, on transparency, access to public information and good government, in relation to the claim presented.

#### Legal Foundations

I

In accordance with article 1 of Law 32/2010, of October 1, of the Catalan Data Protection Authority, the APDCAT is the independent body whose purpose is to guarantee, in the field of the competences of the Generalitat, the rights to the protection of personal data and access to the information linked to it.

Article 42.8 of Law 19/2014, of December 29, on transparency, access to public information and good governance, which regulates the claim against resolutions on access to public information, establishes that if the refusal has been based on the protection of personal data, the Commission must issue a report to the Catalan Data Protection Authority, which must be issued within fifteen days.

For this reason, this report is issued exclusively with regard to the assessment of the incidence that the requested access may have with respect to the personal information of the persons affected, 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.

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 entity" (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 claim is filed against the denial of access to the personal file of a person who has held an administrative assistant position at the OMIC and to the personal file of a municipal social worker.

However, as stated in the antecedents of this report, the claimant union, on the one hand, has given up on its request for access with regard to the personal file of the municipal social worker; on the other hand, he has limited the object of his request, with regard to the file of the person who held an administrative assistant position at the OMIC, to the information that may be contained in it relating to the reasons for which this person has not passed the trial period.

The revised text of the Law on the Basic Statute of the Public Employee (TRLEBEP), approved by Royal Legislative Decree 5/2015, of October 30, provides, in relation to the selective processes in the field of Public administration (article 61), which:

"1. (...)

2. The selection procedures will take special care of the connection between the type of tests to be passed and the adequacy to the performance of the tasks of the jobs called for, including, where appropriate, the practical tests that are necessary.

The tests may consist of checking the knowledge and analytical capacity of the applicants, expressed orally or in writing, in the performance of exercises that demonstrate the possession of skills and abilities, in the verification of the mastery of foreign languages and, in if applicable, when passing physical tests. 3. (...) 4. (...)

5. To ensure the objectivity and rationality of the selection processes, the tests may be completed with the passing of courses, practical periods, with the curricular presentation by the candidates, with psychotechnical tests or with the completion of interviews. Medical examinations may also be required. (...)"

Along these lines, Legislative Decree 1/1997, of October 31, which approves the recasting in a single text of the precepts of certain legal texts in force in Catalonia in the field of public service, establishes that "in the respective call training courses can be established and, where appropriate, a test phase, which can be selective" (article 51.1).

Regarding this test phase, article 53 of Legislative Decree 1/1997 provides that:

"

1. If the call so determines, applicants must pass a probationary period, the duration of which must be determined according to the body or scale to which they wish to enter.

2. During this period, under the immediate tutelage of civil servants, care must be taken to ensure that the person acquires the practical training required to perform the public function and their learning capacity must be assessed.

3. Once this period has ended, a report is issued by the officials in charge of the candidate and the head or heads of the organic units where the official has completed the probationary period. All these reports are made known to the interested party, who can make the allegations they consider appropriate. All this documentation is included in your personal file and sent to the competent body."

At the local level, Decree 214/1990, of July 30, which approves the Regulations for personnel in the service of local entities, provides, by regulating the content of the bases that must govern the selection processes (article 70), that these must contain, among other data, the:

"f) Selective tests that must be carried out and, where applicable, list of merits that must be taken into account in the competition phase, as well as the accreditation and assessment systems for these merits. Determination, if applicable, of the characteristics and duration of the training course or the selective course, as well as the selective practice period."

Despite not having the specific regulatory bases for the call in which the person affected by the requested access would have participated, the general bases that regulate the selective processes

convened by the Vilanova i la Geltrú City Council (BOPB of February 29, 2008) provide (article 15) that:

"1. The employment contract or appointment resolution must provide for a trial or internship appointment period for new staff (...). 2. (...)

3. Once this period has ended, the tutor will issue his/her report, in which he/she will have to state expressly whether they have passed the test period, which will be made known to the interested person, who will be able to make the allegations that it considers appropriate. All this documentation will be included in your personal file. (...)"

Given this, and taking into account the clarification made in the email of November 26, 2020, it must be understood that the access request has as its object the evaluation report issued by the tutor of the person who held the position of administrative assistant at the OMIC, which states the reasons why this person has not passed the trial period that would have been established in the corresponding call. This information must be understood as public for the purposes of article 2.b) of the LTC and subject to the regime of the right of access (article 18 LTC).

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

Article 23 of the LTC, relating to personal data deserving of special protection, establishes the following:

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

In similar terms, article 15.1 of Law 19/2013, of December 9, on transparency, access to public information and good governance, in its wording given by the eleventh final provision of Organic Law 3/2018, of December 5, on protection of personal data and guarantee of digital rights (LOPDGDD), provides that:

"1. If the requested information contains personal data that reveal the ideology, trade union affiliation, religion or beliefs, access can only be authorized if there is the express and written consent of the affected person, unless said affected person had made it manifestly public the data before access was requested.

If the information includes personal data that refers to racial origin, health or sexual life, includes genetic or biometric data or contains data

relating to the commission of criminal or administrative offenses that did not entail a public reprimand to the offender, access may only be authorized if the express consent of the affected person is counted or if that person is covered by a rule with the force of law."

In general, in the event that in the evaluation report of the person who held the position of administrative assistant at the OMIC there was or from its content information deserving of special protection could be deduced, with attention to the specific reasons for which it has been considered that the probationary period cannot be passed (for example, if there was information of a psychological or psychiatric nature), its confidentiality will have to be preserved, unless with the request the express consent of the affected person had been provided or any other of the enabling circumstances provided for in article 15.1 of Law 19/2013, mentioned. If none of these circumstances occur, the right to data protection would prevail over the right to access information.

#### IV

In relation to the rest of the personal data that may appear in the aforementioned evaluation report that are not considered to be particularly protected, it will be necessary to adhere to the provisions established in article 24 of the LTC, according to which :

"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. (...)"

Section 1 of this precept of the LTC allows access to the merely identifying data of the people who, in this case, have intervened in the evaluation of the (then) municipal worker due to their duties, provided that it is data that is strictly necessary for the exercise of these functions.

That is to say, unless there is an exceptional circumstance for the affected person (for example, being in a particularly vulnerable situation), it must be possible to access the information strictly necessary to identify the person carrying out an administrative action specific (name and surname) and the position or position you hold. Any other personal information about the people who have intervened in the procedure due to their position could not find protection in this provision.

Therefore, facilitating the claimant union's access to the name, surname and position of the tutor who issued the evaluation report of the person who held the position of administrative assistant at the OMIC would not, in principle, be contrary to the right to the protection of personal data.

However, with regard to the information linked to the assessed person, such as the reasons why it is considered that he has not passed the probationary period, paragraph 2 of this article 24 will be applicable, therefore, to effects of granting access, it is necessary to make a reasoned weighting between the public interest in the disclosure of the information and the rights of the affected person.

At this point, note that the person requesting access is the general secretary of a trade union organization, without specifying whether she holds the status of a worker representative body.

Although in the abstract this question could be relevant, given that the representative bodies of public workers - not so the union itself - have recognized legitimacy to receive information for the exercise of their legitimate representative functions (articles 40 TRLEBEP and 64 ET), agreeing that in the present case this circumstance (that the claimant could be a delegate or representative of the workers) would not have a particular impact, given that there is no specific provision in the applicable regulations establishing the need to deliver the controversial information to the public workers' representatives.

In accordance with article 18.2 of the LTC, the exercise of the right of access is not subject to motivation, but the fact that the applicant expresses what is the purpose he pursues and ultimately the reasons for which he is interested knowing the information adds a very important element to be taken into account as a weighting criterion between the public interest in the disclosure of the information and the rights of the people affected.

In the present case, the claimant union alleges that "the motivation is to know the causes that lead to not passing the probationary period, since as a general rule no report is issued to have passed it and it has been so only in this recent case has this reason been adduced to fire a worker".

Article 15 of the general bases that regulate the selective processes called by the City Council, to which we have referred in section II of this report, establishes in its section 3 that "once this period has ended the tutor /a will issue their report, in which they will have to state expressly whether they have passed the trial period (...)".

Paragraph 4 of this article 15 adds that "if in the judgment of the tutor, motivated in his reports, any of the applicants does not successfully pass the trial or internship period, he will lose all his rights for resolution of the Mayor's Office, equally motivated, which will result in the termination of the contract or the revocation of the appointment and the loss of any right that may correspond to him by virtue of the selective process."

It follows from these precepts that the tutor is obliged to issue an evaluation report on the working person once the probationary period has ended, whether he considers that he has passed it or not, and that he must leave evidence of this circumstance in said report, as well as the reasons that lead it to issue the assessment in one sense or another.

It should be noted, at this point, that the same bases (article 15.3) expressly provide that the content of the report must be made available to the assessed person, who may make the allegations he considers appropriate for the defense of their interests: "(...) the tutor will issue

their report, in which they must state expressly whether they have passed the trial period, which will be made known to the interested person, who will be able to make the allegations they deem appropriate. (...).”

Therefore, in a case like the one examined, it can be assumed that the affected person (the person who held the position of administrative assistant at the OMIC) would have knowledge, or could have had knowledge, of the specific reasons why he would not have passed the probationary period, which would have led to the revocation of her appointment as a trainee official at the City Council. In other words, the right to defend his interests in the selective process in which he participated does not seem to have been affected.

Given this, the claimant union's access should be understood as framed within the purpose of the transparency law itself. According to its article 1.2, the purpose of the LTC is "to establish a system of relationship between the people and the public administration and the other obliged subjects, based on the knowledge of the public activity, the incentive of the citizen participation, the improvement of the quality of public information and administrative management and the guarantee of accountability and responsibility in public management."

The control of the actions of the Administration in the matter of planning and management of human resources is one of the objectives aimed at transparency (this is clear from the statement of reasons of the LTC).

The information requested by the claimant union refers to the specific reasons why a certain person has been deemed unfit to occupy a certain job in the civil service. This motivation could include the evaluation of different personal aspects of this person, such as his professional performance or his behavior or conduct (both his own and towards third parties), even certain aspects of his personality, could do reference to his mental health or be related to possible breaches of the duties inherent in the exercise of the public function, among others.

We are therefore faced with information that can provide a profile on the person being evaluated, which can even have repercussions beyond the strictly professional field, the disclosure of which can produce significant negative effects on the person affected, without which, both from the point of view of transparency and data protection, it can be considered justified.

On the other hand, the possibility of handing over anonymized data must also be ruled out. In a case like this, the elimination of the personal identifying data of the affected person in the documents provided would not be an effective tool to guarantee the anonymization of the information provided, given that, as can be seen from the file sent, the information provided could easily be linked to a specific identifiable person.

Therefore, unless there is the consent of the affected person, the union cannot be granted access to the specific content of the evaluation report, which contains the reasons why the affected person has not passed the trial period

Having said that, for the purposes of achieving the objective of controlling the actions of the administration in this area of action, in a case such as the one proposed, the union could be provided with information relating to the specific tasks that correspond to a administrative assistant job at the OMIC such as the one held by the person affected by the access and also information on the criteria or the specific aspects that the tutors must take into account in an evaluation



characteristics. With this information, the claimant union can already be aware of the criteria applied without affecting the personal sphere of the specific person affected.

#### **conclusion**

In the absence of the consent of the affected person, the claimant union cannot access the evaluation report of the probationary period of the person who held the position of administrative assistant at the OMIC, which contains the specific reasons for who have not passed this test of the selective process. However, you could be provided with information about the tasks associated with a job of this nature and about the criteria or aspects to be evaluated by the people who exercise the tutelage of the people who are in a probationary period or in internships in this type of workplace.

Barcelona, January 7, 2021

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