

Ref. IAI 41/2020

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 councilor against a town hall for the denial of direct access to municipal information through the document manager

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 councilor against the City Council, for denial of access direct to municipal information through the municipal document manager.

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 July 11, 2019, a councilor from a municipal group requests from the City Council "full access through the BPM to be able to enter and consult municipal information, accounting, supplier invoices, projects, hiring criteria , contracts for both contracted personnel and works and all the information necessary for this municipal group to properly monitor municipal management".
2. On September 25, 2020, the municipal group presented a claim before the GAIP against the City Council in which it states that "a battery of instances have been presented since the first day of the 2019-2023 legislature, the relationship of "instances that we attach have not been answered."

The following list is attached to the claim:

- BPM data access 11/07/2019
- Lighting Pkg 16/01/2020
- BPM repeat 01/24/2020
- Employment contracts 02/13/2020
- Extension of employment contracts 12/03/2020
- Indemnities lawyer 12/03/2020
- Field hospital 04/10/2020
- PCR instance 05/20/2020
- Sector 21 Profile 25/05/2020
- Invoices 07/07/2020
- Questions MarketPlace 07/07/2020
- Job recruitment file for OAC 07/07/2020

3. On October 1, 2020, the GAIP informs the municipal group that, given the presentation of a single claim for the neglect of eleven separate access requests, it has proceeded to split its claim, giving place in the following claims: 525/2020, 530/2020, 539/2020, 540/2020, 541/2020, 542/2020, 543/2020, 544/2020, 545/2020 and 546/2020.

Complaint 525/2020, the subject of this report, refers to the request submitted on July 11, 2019, the purpose of which is to directly access municipal information through the document manager.

4. On October 4, 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 claimant, and requiring it to issue report in 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 they will represent them in the mediation session.

5. On November 24, 2020, the City Council responded to GAIP's request by sending it the municipal secretary's report in relation to the municipal group's access request of July 11, 2019, in which, among other issues, it states that (FJ IV):

"Indiscriminate access to all the files and documents of the entity may violate the data protection regulations and consequently, access to local elected officials may be restricted by the application of the same, which implies that in the cases in which access refers to files containing specially protected personal data and personal and family privacy, honor and self-image (articles 9.1 RGPD and 164.3 TRLMRLC) must be previously requested from the mayor's office and will from being the object of resolution to the object of valuing and weighing what is the information to provide."

It also sends to the GAIP a copy of the Mayor's Decree of November 20, 2020, in which a resolution is issued on the aforementioned access request in the following terms:

"First: Do not authorize (...) access through the BPM to municipal information, accounting, supplier invoices, projects, hiring criteria, personnel contracts and works, because there is no right to 'direct, unlimited and indiscriminate access by local elected officials to all documents and electronic files of the document manager. This Corporation fully complies with the direct access to information to which all local elected officials are entitled, in accordance with the regulations set forth and as has been made clear in the legal report, through the "councilor's folder" inserted in the manager municipal documentary, and the corresponding publication in the Transparency Portal through the electronic headquarters.

(...). "

6. On December 18, 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

The object of the complaint is, as can be seen from the statements of the complaining party and the set of information contained in the file, direct access to the municipal document manager BPM and, consequently, to all the information or files held by the local corporation, which may include personal data of various nature.

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".

Article 6.3 of the RGPD establishes that the basis of the treatment indicated in this article 6.1.c) must be established by the Law of the European Union or by the law of the Member States that applies to the person responsible for the treatment.

The reference to the legitimate basis established in accordance with the internal law of the Member States referred to in this article requires that the rule of development, when dealing with the protection of personal data of a fundamental right, has the status of law (Article 53 EC ), as recognized in Article 8 of Organic Law 3/2018, of December 5, on the protection of personal data and the guarantee of digital rights (hereinafter, LOPDGDD).

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".

Now, the second section of the first additional provision of the LTC provides that "access to public information in matters that have established a special access regime is regulated by their specific regulations and, additionally, by this law."

Thus, in the case at hand, in which the councilors of a municipal group have access to all municipal information directly from the BPM document manager, they apply, for the purposes of granting or denying this access, the provisions that establish the local regime legislation, fundamentally, Law 7/1985, of April 2, regulating the bases of the local regime (LRBRL), the Consolidated Text of the Municipal and Local Regime Law of Catalonia , approved by Legislative Decree 2/2003, of April 28 (TRLMLC), without prejudice to the fact that, in everything not provided for in these regulations, the LTC is additionally applied.

### III

As this Authority has done on previous occasions (among others, reports IAI 48/2019, IAI 52/2019, IAI 56/2019 or IAI 3/2020, which can be consulted on the website <http://apdcat.gencat.cat>), the local regime legislation recognizes a right of access to all elected officials, regardless of whether they are in the government team or in the opposition, to the information available to their local corporation and that can be necessary for the exercise of the functions that correspond to them.

Point out that, as can be seen from these reports, the right of access to municipal information corresponds to councilors and not to the municipal group.

Thus, article 77.1 of the LRBRL establishes that "all members of local corporations have the right to obtain from the Mayor or President or the Government Commission any background, data or information held by the services of the Corporation and are necessary for the development of their function".

In the same sense, the TRLMRLC pronounces itself, by providing, in its article 164.1, that "all members of local corporations have the right to obtain (...) all the background, data or information that are in the possession of the services of the corporation and are necessary for the development of its function."

The right to obtain all the antecedents, data or information that are in the possession of the services of the local corporation and necessary for the exercise of their functions, in accordance with repeated jurisprudence on this issue (SSTS September 27, 2002, June 15, 2009, among others), is part of the fundamental right to political participation enshrined in article 23.1 of the Spanish Constitution, according to which "citizens have the right to participate in public affairs, directly or through representatives, freely elected in periodic elections by universal suffrage."

It should be borne in mind that the elected officials participate in a public action that manifests itself in a wide range of specific matters, such as the right to audit the actions of the corporation, the control, analysis, study and information of the necessary antecedents that have the services of the City Council, for their control task and to document themselves for the purposes of adopting decisions in the future (among others, STS of March 29, 2006).

However, the exercise of this right of access to municipal information is in any case subject to certain conditions provided for in the TRLMRLC, cited, and in the Regulation on the organization, operation and legal regime of local entities (ROF), approved by Royal Decree 2568/1986, of November 28, without prejudice to what may be established by the organization and operation regulations of each local entity.

It is therefore necessary to analyze the legal provisions of the aforementioned regulations in order to assess whether the local regulations, or alternatively the transparency legislation, would enable the access claimed by the councilors in the present case.

### IV

**Article 164.2 of the TRLMRLC provides in which cases the corporation's services must provide information directly to the elected members in the following terms:**

**"2. The corporation's services must provide information directly to the members of the corporations when: a) They exercise delegated functions and the information refers to matters of their own responsibility. b) These are matters included in the agenda of the sessions of the collegiate bodies of which they are members. c) It is about access to information or documentation of the local corporation that is freely accessible to citizens."**

**For its part, article 40 of the Municipal Organic Regulations of the City Council (ROM) provides the following:**

**"1.- The corporation's services must directly provide the antecedents, data and information to the members of the corporation when: - They exercise delegated functions and the information refers to matters of their responsibility.**

**- These are matters included in the agenda of the sessions of the collegiate bodies, of which they are part, as long as these have been called.  
- This is information or documents that are freely accessible to citizens.**

**- This concerns the consultation of the minutes of the Plenary, of the Local Government Board, of the collegiate bodies of the autonomous municipal bodies, general meetings and boards of directors of the municipal mercantile companies, books of resolutions of the Mayor's office and the delegated councilors or the one-person bodies of the autonomous bodies.**

**- When it comes to the consultation of official bulletins or newspapers of legislation, bibliography, ordinances and municipal regulations that are in force, and regulatory statutes of autonomous municipal bodies, of commercial companies owned or controlled by the municipality, of supra-municipal organizations of a character public of which the City Council (...) is part and of any other type of associations, foundations or bodies, public or private, in the governance of which the City Council intervenes.**

**- This is about access to the data contained in the Register of interests of the City Council (Register of activities and Register of heritage assets).**

**2.- In all these cases, the staff at the service of the corporation in charge of its custody, must facilitate its consultation to all members of the corporation.**

**3.- The right of access to the background, data and information directly, also includes the right to obtain photocopies, or copies on computer support if applicable, of specific and individualized documents, without requiring requests generic or indiscriminate. These photocopies will be requested in writing before the General Registry, and will be delivered in the shortest time possible, without exceeding the term of 5 working days. However, when the complexity of the requested information so determines, this period may be extended up to a maximum of 15 working days. This determination must be motivated to the requesting member."**

**It is stated in the file (report of the accidental secretary) that the City Council, through the "councilman's folder" of the document manager BPM, provides local elected officials with "direct, autonomous and automated access to all the information own of the matters included in the age**

the collegiate bodies with complete documentation; to all resolutions issued by the Mayor and delegated councilors (...); to all information freely accessible to citizens; plus the notices, agendas and acts of the collegiate and individual bodies of the municipal company."

Councilors' access to the aforementioned information must be understood as part of the council's obligation to inform elected members of the necessary information for the purposes of control and supervision of the actions of the municipal administration, in accordance with articles 164 of the TRLMRLC and 40 of the ROM, cited. In this sense, it does not seem that the right of councilors to obtain direct access to said information from the City Council can raise doubts from the perspective of the personal data protection regulations.

Having said that, it must be taken into consideration that in the present case the councilors are requesting direct access to the BPM document manager in order to be able to directly access all the information available to the City Council. This request goes beyond the direct access provisions of articles 164.2 of the TRLMRLC and 40 of the ROM, so it is necessary to bear in mind what is established in article 164.3 of the TRLMRLC, as well as in article 41 of the ROM .

v

Article 164.3 of the TRLMRLC establishes in which cases the members of the corporation must request the information or documentation in the following terms:

"3. In the other cases, the request for information is understood as accepted by administrative silence if a negative resolution is not issued within four days from the date of presentation of the request. In any case, the negative resolution must be motivated, and can only be based on the following assumptions:

- a) When the knowledge or dissemination of the information may violate the constitutional right to honor, personal or family privacy or one's own image.
- b) When it comes to matters affected by the general legislation on official secrets or for summary secrecy."

In similar terms, article 41 of the ROM provides that:

"1.- Except for the cases provided for in the previous article, the members of the Corporation who wish to access the information must request it by means of a letter to be submitted through the General Registry, in which the antecedents will be specified , data or information that is requested for the development of their function.

2.- The request can be addressed to the mayor, presidents of the information commissions and councilors with delegation. When it comes to documentation held by autonomous municipal bodies, the request must be addressed to their Presidency, and when held by municipal companies, to the Mayor's Office.

3.- The request for information will be considered accepted by administrative silence if a negative resolution is not issued within five calendar days or four working days (if this period is more beneficial), counted from the date of presentation of the request, and the member of the corporation must be given access to the requested information, within ten working days from the same date. In any case, the negative decision will be motivated, and can only be based on the following assumptions:

a) When the knowledge or dissemination of the information may violate the constitutional right to honor, personal or family privacy, or one's image. b) When it comes to matters affected by the general legislation on official computer secrets, statistics, or summary secrecy. (...).”

It should be noted that access requests may be denied when any of the circumstances provided for in articles 164.3 of the TRLMRLC and 41.3 of the ROM occur, but access could also be denied, given the nature of the right to the protection of data (STC 292/2000), when, regardless of whether certain data can be considered intimate or not, there are other specific circumstances related to personal data that justify it, in particular under the protection of the principle of data minimization, d according to which "personal data will be adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed" (Article 5.1.c) RGPD)).

This principle implies, on the one hand, that access to municipal information that includes certain personal data, without the consent of those affected, must necessarily be linked to the exercise of the functions that correspond in each case to the councilor what it is about, in the terms provided for in the local regime legislation (whether they are part of the governing bodies or not).

Thus, the processing of personal data that may be carried out by councilors who do not have assigned government responsibilities, as would happen in the present case, would find its justification, from the perspective of data protection, in the exercise of the functions that are assigned as members of collegiate bodies of the local entity itself and, in a special way, in the functions of control and supervision of municipal action, such as the formulation of questions, interpellations, motions or until and all the motion of censure, which the local regime regulations attribute t

On the other hand, the minimization principle requires a weighting exercise to be carried out, in order to assess the implications that, in each case, the exercise of the right of access to councilors' information may have for the rights of the people affected , taking into account, for this purpose, the circumstances of the specific case, the personal data contained in the requested information, the intended purpose and the terms with which the request is made or the possible s

The aim of this weighting is to prevent excessive or irrelevant personal data from being communicated to the councilors to achieve the intended purpose of the access, which must necessarily be linked to the performance of the functions of the councilors who request the information.

For this reason, and beyond the cases of direct access specifically provided for in articles 164.2 of the TRLMRLC and 40 of the ROM, pursuant to article 164.3 of the TRLMRLC and article 41.3 of the ROM, and in application of the principle of minimization of the data, it would be contrary to the RGPD to provide councilors with direct access to all municipal information through the BPM document manager (or through any other means), as they request, given that this would prevent the The City Council carried out the weighting of the conflicting rights and interests that, as the person in charge, must carry out in order to assess the appropriateness of access to the personal data that may be included in said information.

In other words, from the perspective of the personal data regulations, councilors' access through the BPM document manager to the set of information available to the City Council must be carried



respecting the principle of data minimization (article 5.1.c) RGPD) and this implies a prior weighting exercise that makes it impossible to recognize the direct access intended by the councillors.

It must be borne in mind that we are faced with generalized and indiscriminate access to all municipal files or other municipal information, not limited or limited in time and without specifying the specific reasons for which the access is of interest.

As the Authority has pointed out, and in accordance with local regime legislation and the jurisprudence of the Supreme Court, councilors cannot be required that, in order to access municipal information, they must explain or justify the purpose of your request, since the reason for your request must be understood as implicit in the exercise of their functions as councilors, who are responsible for the control and supervision of the governing bodies of the corporation, as and as explained in article 22.2.a) of the LRBRL.

However, this municipal information can be related to any of the areas of competence of the corporation (works and services, economic management, treasury, social services, urban planning, environment, public transport, human resources, etc.), and have as its object the 'awarding of works or services, the granting or denial of grants or subsidies, permits or licences, the appointment or dismissal of personnel, the imposition of fines or administrative sanctions, etc.

Therefore, the type of personal information contained in the information available to the City Council can be of different nature and affect the privacy of the people it refers to to a greater or lesser degree.

Thus, it cannot be ruled out, depending on the area of municipal action, that there may be special categories of data (Article 9 RGPD), data included in this category with a specific regime (those relating to administrative offenses or criminal), or data deserving of a special reservation or confidentiality due to the concurrence of certain qualified circumstances (for example, situations of social vulnerability, data of minors, data related to gender violence, the possibility of creating profiles socioeconomic, etc.).

These circumstances could act as a limit to the councilors' right of access to the controversial information, in the event that the relevance of the specific identification of these persons for the exercise of the functions attributed to them is not sufficiently proven to elected officials.

The will of the councilors in the present case to want to have knowledge of everything that the City Council decides in order to be able to control and supervise its actions is not sufficient reason to justify indiscriminate access to this personal information, which may affect seriously the privacy of the people affected.

Nor can it be ruled out that the information or the municipal files contain other unnecessary personal information to achieve this purpose of control and supervision of the municipal action that would justify the councilors' access, which should be excluded in any case.

Furthermore, the fact that the intended access would affect a large volume of people cannot be ignored. Although the number of people affected is not actually a decisive criterion when it comes to being able to limit access, it must be taken into account that when the people affected are very numerous, this can lead to a series of problems in being able to attend to the sun - request for access with the du

the hearing procedure provided for in article 31 of the LTC and assess, case by case, whether the protection of personal data or the right of councilors to access municipal information should prevail.

Given these circumstances, it cannot be concluded that, from the point of view of data protection, it is appropriate for councilors to have direct access to all the information that the City Council has in its database of the BPM document manager such as these request

## VI

Finally, it should be remembered that whenever the councilors' access to personal data is carried out due to the functions entrusted to them as such, they must be governed, apart from the duty of reservation imposed by the local regulations (article 164.6 TRLMRLC), by the principle of purpose limitation (article 5.1.b)) and by the principle of integrity and confidentiality (article 5.1.f)) established in the RGD.

Thus, article 164.6 of the TRLMRLC provides that "the members of the corporation must respect the confidentiality of the information to which they have access by virtue of their position if the fact of publishing it could harm the interests of the local entity or third parties."

Likewise, in accordance with the principle of purpose limitation (Article 5.1.b) RGD), any use of personal information after access by councilors should also be based on a legitimate purpose. Otherwise, we could be faced with a treatment not adjusted to the RGD, even though the access to personal data was initially considered legitimate.

In addition, this purpose in which the subsequent processing of personal data by councilors could be framed should not be incompatible with that which at the time would have justified the access, that is the exercise of the legally attributed functions .

For its part, in accordance with the principle of integrity and confidentiality (Article 5.1.f)) RGD "personal data will be treated in such a way as to guarantee an adequate security of personal data, including protection against non- authorized or illegal and against accidental loss, destruction or damage, through the application of appropriate technical or organizational measures."

### conclusion

Apart from the cases of direct access to municipal information or documentation by the councilors referred to in articles 164.2 of the TRLMRLC and 40 of the ROM, access to municipal information requires a prior weighting that allows the councilors to be informed of data strictly necessary to achieve their functions of control and supervision of municipal action, which is why direct access to the BPM document manager as requested by the complaining councilors cannot be allowed.

Barcelona, January 14, 2021