

Ref.: IAI 44/2020

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 a department for the denial of access to the request for a copy of the report it made on the investigation of a police action at a demonstration

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 presented against a department for the denial of access to the request for a copy of the report he made on the investigation of a police action at a demonstration.

Having analyzed the request, which is accompanied by a copy of the administrative file processed before the GAIP, in accordance with the report of the Legal Adviser, I report the following:

#### Background

1. On October 2, 2020, a citizen submitted to a department a request for access to public information, with the following content:

"I request a copy of the report that (...) made on the investigation of an action (...) at a demonstration (...)/.

I also request to know if, based on the investigation of these facts, any policeman was sanctioned and, if so, the position of each sanctioned policeman, what sanction was imposed and the reason for this one."

2. The department rejected the request for access to public information submitted. The resolution bases the denial on the application of the limits of article 21.1.b) and 23 of Law 19/2014, insofar as it affects information directly linked to the investigation and sanction of criminal, administrative or disciplinary infractions . As stated, with respect to the facts referred to in the request there is an open criminal procedure that is processed in a Court and given that the information required directly affects this judicial procedure considers that the request must be denied to avoid entering into collision and create a prejudice in that investigation.

3. On November 16, 2020, the applicant for access to public information submits a claim to the GAIP to which he reiterates the request in the same terms as it was made to the department complained of. In addition, it states that the refusal is based on the existence of personal data, but the information can be submitted anonymized. He also alleges that: "Knowing the result of an internal investigation by the Mossos would serve to hold the Administration accountable and would not harm a possible judicial investigation. As the Transparency Council has considered in different resolutions: We must remember, first of all, that the general rule established in the LTAIBG is to provide information, the limits being the exception and that, as such, it must be duly justified by whoever invokes it. On the other hand,

it has not been sufficiently accredited by the Administration that the investigation and sanctioning work may be prejudiced by making the reports public.

This criterion is the same that could be applied in this case, knowing the requested information would serve to render accounts and would not harm any investigation, it has not been proven.”

4. On November 18, 2020, the GAIP requests the complained department to issue a report on the complaint submitted, identify the third parties affected by the access and send the completed file to which it refers. The submitted documentation does not include the report from the claimed department.

5. On December 23, 2020, the GAIP addresses the 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

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 (art. 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 Directive 95/46/CE (General Data Protection Regulation, hereafter RGPD) is repealed.

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), defines personal data as "all information about 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; "(article 4.1 RGPD).

The claimant requests access to "a copy of the report that the claimed department made on the investigation of an action (...) at a demonstration(...)" in addition to knowing whether "of the investigation of 'these facts were sanctioned to some police officer and, if so, the position of each police officer sanctioned, what sanction was imposed on him and the reason.'

It can be expected that the requested information will contain personal data both of those responsible for the report and of the people involved in the facts that are the subject of it.

In accordance with the definition of treatment in article 4.2 of the RGPD "consultation, use, communication by transmission, dissemination or any other form of enabling access, access or interconnection, limitation, deletion or destruction" of personal data, are data treatments subject to the principles and guarantees of the RGPD. Therefore, the communication of personal data by the claimed department, as a result of the request made by the claimant, is data processing under the terms of the RGPD.

The RGPD provides that all processing of personal data must be lawful, loyal and transparent in relation to the interested party (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 its article 6.1 to apply. Specifically, sections c) and e) of article 6.1 of the RGPD provide respectively, 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", or if "it is necessary for the fulfillment of a mission carried out in the public interest or in the exercise of public powers conferred on the person responsible for the treatment".

As can be seen from article 6.3 of the RGPD and expressly included in article 8 Organic Law 3/2018, of December 5, on the protection of personal data and guarantee of digital rights (LOPDGDD), the processing of data it can only be considered based on the legal bases of article 6.1.c) and 6.1.e) of the RGPD when so established by a rule with the rank of law.

At the same time, 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, body or entity in accordance with the Law of the Union or of the 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 (LTC hereinafter) aims, among others, to "regulate and guarantee people's right of access to public information and documentation" (art. 1.1.b).

Specifically, article 18 of the LTC establishes that "people have the right to access public information, referred to in article 2.b, individually or in the name and representation of any legal entity legally constituted" (section 1). The mentioned article 2.b) 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 the which are supplied by the other obliged subjects in accordance with the provisions of this law".

The information that is the subject of the claim is "public information" for the purposes of the LTC and remains subject to the access regime provided for in these regulations. 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 LTC), and the principles of the personal data protection regulations.

### III

According to article 23 of the LTC, requests for access to information must be denied if "the information to which access is sought contains particularly protected personal data, such as those relating to ideology, the union membership, 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 I expressly consent to it by means of a written document that must accompany the request".

In the same sense, article 15.1 of the LT, states "(...) If the information includes personal data that refers to racial origin, health or sexual life, it 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."

These precepts exclude the citizen's right of access to data related to the commission of criminal or administrative offences, unless the express consent of the affected person is obtained, or if this entails a public reprimand to the offender .

According to the documentation contained in the file, the resolution of the claimed department 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 insofar as they are related to the commission of criminal or administrative or disciplinary offences. As stated, with respect to the facts referred to in the petition there is an open criminal procedure that is processed in a Court of Inquiry of the judicial party of Prat de Llobregat, for this reason in the resolution it is considered that, given that the information required directly affects this judicial procedure, the request must be denied to avoid entering into a collision and creating a prejudice in that investigation.

The claimant alleges that knowing the result of an internal investigation into the actions of the Mossos would serve to hold the Administration accountable and that the damage to the judicial investigation has not been justified, in addition to putting manifest that the information can be provided anonymously.

It is not up to this Authority to assess the application of other limits other than the protection of personal data and therefore, the application of the limit provided for in article 21.1.a). However, the fact that the requested information is linked to an open criminal procedure has a direct impact on the application of the aforementioned articles 23 of the LTC and 15.1 of the LT.

With regard to access to the internal report carried out by the department on police actions in a demonstration, it must be taken into account that these investigative actions are fundamentally aimed at determining, with the greatest possible precision, the facts and the possible existence of criminal or administrative responsibilities as a consequence thereof and, eventually, the identification of the person or persons who may be responsible and the relevant circumstances that may occur.

It is a consolidated jurisprudential criterion that the investigation phase prior to the start of a sanctioning or disciplinary procedure does not properly constitute an administrative procedure (among others, STSJM 471/2006, of May 24), as well as that its reserved nature (its knowledge can lead to clear damage to the result of the same) prevents access to its content during its processing (among others, STS 21/2018, of February 15).

As this Authority has previously highlighted in the IAI 41/2018 report, which can be consulted on the Authority's website [www.apdcat.cat](http://www.apdcat.cat), once the reserved investigation procedure has been completed, the regime of access to the information will be different if it has been agreed to archive the actions without the initiation of any procedure (whether disciplinary, disciplinary or criminal), than it would be if any of these procedures have been initiated and depending on whether the person requesting access is considered interested in the aforementioned procedure or not. In the case at hand, according to the information contained in the file, the investigative actions of which the requested report is part would have ended but the facts would be the subject of criminal proceedings in a Court of 'Instruction of the judicial party of Prat de Llobregat. On the other hand, this documentation does not state that the claimant has the status of a person interested in the ongoing criminal proceedings.

Therefore, in principle this information could not be delivered. However, it should be borne in mind that the person making the claim expressly states in their claim that access to the information could be done anonymously.

Facilitating access to public information prior to anonymization of the personal data contained therein is, in fact, an option expressly provided for in the transparency regulations.

Thus, article 15 of Law 19/2013, of December 9, on transparency, access to public information and good governance, establishes that:

"4. What is established in the previous sections will not be applicable if access is effected prior to the dissociation of personal data in a way that prevents the identification of the affected persons."

However, in order for anonymization to be considered sufficient for the purposes of data protection legislation, it is necessary to ensure that the information provided does not relate to an identified or identifiable natural person.

To determine if a natural person is identifiable "must be taken into account all the means, such as singularization, that can reasonably be used by the person responsible for the treatment or any other person to directly or indirectly identify the natural person. 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 as technological advances" (consideration 26 RGPD).

Therefore, and without prejudice to the fact that the concurrence of other limits (as would be the case of article 21.1.a), if applicable) may justify the limitation of access, from the point of view of the right to the protection of data if the report is provided anonymized, as requested by the person making the claim, without it being possible to identify the persons investigated without disproportionate effort, the requested information could be provided.

The same conclusion is applicable with respect to the information requested by the claimant regarding whether, as a result of the internal investigation report of the claimed department, any disciplinary proceedings were initiated against any police officer and, if so, the position of the same, the penalty and the reason. Although in principle the identification of the sanctioned persons is not requested, this information could only be considered anonymous and, therefore, unrelated to the application of data protection regulations, as long as the specific circumstances are taken into account (for example the position), the affected persons are not identifiable in accordance with the provisions of article 4.1 of the RGPD and Recital 26 of the RGPD. In the event that any of the affected information could identify the affected person (e.g. job title), this information should be excluded from access.

In the requested report, apart from the information relating to the people investigated, it can be foreseen that there will also be information about the person or people who carried it out.

Article 24.1 of the LTC provides that:

"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."

This article generally enables access to merely identifying information (name, surname and position) of public employees who intervene by reason of their functions in the different procedures or public actions carried out by the Administration, unless circumstances concur specific that justify the prevalence of the right to data protection of the person or persons affected.

Therefore, unless the existence of specific circumstances that prevent it has been proven, it would be necessary to provide the identifying information (name and surname) relating to the positions and public employees who have intervened in the preparation of the aforementioned report and which are contained in this document.

Finally, point out that it is not known exactly what information may be included in the report prepared by the Department. It is foreseeable that there will be other personal information which in principle is not related to the commission of criminal or administrative offences but which in any case seems to be related to the identification or the performance of the agents who have been the subject of investigation by the alleged commission of infractions. That being so, and having concluded in the previous legal basis that there is no authorization for the communication of data related to the commission of criminal or administrative offences, access to this information should also be denied.

## Conclusions

The data protection regulations do not prevent the claimant from accessing the report on the investigation of an action by the Mossos d'Esquadra at a demonstration, as well as to find out whether the investigation of these facts resulted in sanctions to some police officer, the penalty imposed on him and the reason, after anonymization of the personal data of the affected officers.

Likewise, the personal data protection regulations do not prevent access to the identification data of the administration personnel who have intervened in the preparation of the aforementioned report and are contained in this document.

Barcelona January 26, 2021