CNS 2/2021

Opinion in relation to the query made by a City Council regarding the request for access made by a councilor to various documents in the municipal archive

A letter from a City Council is presented to the Catalan Data Protection Authority in which it is requested that the Authority issue an opinion on the access request made by a councilor to various documents from the municipal archive.

In particular, according to the e-mail attached to the request, the councilor explains that he is conducting a study on the municipality and, with this aim, requests to consult the municipal file regarding the record of deaths between the years 1885-1890, 1918-1921, 1957-1959 and 1968-1969, as well as the minutes and correspondence corresponding to these dates.

Having analyzed the request, which is not accompanied by more information, and in accordance with the report of the Legal Counsel, the following is ruled.

I

(...)

II

The Regulation (EU) 2016/679, of the Parliament and of the European Council, of April 27, 2016, General Data Protection (hereinafter, RGPD), in accordance with what is established in articles 2.1 and 4.1, is of application to the treatments that are carried out 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".*

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".*

In accordance with the provisions of article 5.1.a), any processing of personal data must be lawful and, in this sense, the RGPD establishes the need to comply with one of the legal bases of article 6.1, among which section c) provides for the assumption that the treatment *"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 of the Member States that applies to them in order to reconcile the public's access to official documents with the right to the protection of personal data under this Regulation".*

The regulation and guarantee of public access to documents held by public authorities or public bodies is regulated in our legal system in Law 19/2014, of December 29, on transparency, access to public information and good governance (hereinafter, LTC), which it acknowledges to individuals, in an individual capacity or in the name and representation of a legally constituted legal entity, the right of access to public information, understood as such *"the information prepared by the Administration and that which it has in his power as a result of his activity or the exercise of his functions, including that supplied by the other obliged subjects in accordance with the provisions of this law" (article* 2.b) and 18 LTC). 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).

For its part, the first additional provision of the LTC, in the second section, provides that *"access to public information in matters that have established a special access regime is regulated by their specific regulations and, with supplementary character, by this law".*

In the case we are dealing with, in which a councilor is asked to consult certain documentation contained in the municipal archive, the provisions established by the legislation of the local regime apply, mainly Law 7/1985, of 2 April, regulating the bases of the local regime (LRBRL) and Legislative Decree 2/2003, of 28 April, which approves the revised text of the Municipal and Local Regime Law of Catalonia (TRLMRLC).

III

It should be noted that this Authority has previously had the opportunity to analyze the councilors' right of access to the information available to their corporation, necessary for the exercise of the functions that correspond to them, regardless of whether they are in the team of government or in the opposition (among others, in the opinions CNS 10/2017 or CNS 29/2018, as well as in the reports IAI 48/2019, IAI 52/2019 or IAI 3/2020 available on the website https:/ /apdcat.gencat.cat).

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 result preciso para el desarrollo de su funcio",* or article 164.1 of the TRLMRLC in providing that *"all members of local corporations have the right to obtain (...) all the background, data or information that are held by the corporation's services 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 , which 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, as this Authority has already recalled on several occasions, the exercise of this right of access to municipal information is subject to the regime provided for in the TRLMRLC and in the Regulation on the organization, operation and legal regime of the entities local bodies (ROF), approved by Royal Decree 2568/1986, of November 28, without prejudice to what may be established by the regulation of organization and operation of each local body, in its case.

It is therefore necessary to analyze the legal provisions of the aforementioned regulations in order to assess whether the local regulations would enable the access claimed by the councilor in the present case.

IV

Article 164 of the TRLMRLC recognizes the right of councilors to request information held by the local entity and establishes in which cases the services of the local entity must provide the information directly to its members, in the following terms :

"[...] 2. The services of the corporation must directly provide information to the members of the corporations when:

a) Exercise delegated functions and the information refers to their own affairs 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.

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 image.

b) When it comes to matters affected by the general legislation on official secrets or by summary secrecy."

The file contains the request addressed to the City Council, on January 6, 2021, through which the councilor requests to consult the municipal archive, and in particular, the record of deaths among the years 1885-1890, 1918-1921, 1957-1959 and 1968-1969, as well as the act books and correspondence corresponding to these dates, since he states that he is carrying out a study on the municipality.

Councilors' access to the information provided for in article 164.2 of the TRLMRLC must be understood as part of the corporation's obligation to inform the elected members of the necessary information for purposes of control and supervision of the performance of the 'Municipal administration.
Consequently, 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 councilor's request goes beyond the provisions for direct access, so it is necessary to bear in mind what is established in article 164.3 of the TRLMRLC. It should be noted that access requests can be denied when any of the circumstances provided for in articles 164.3 of the TRLMRLC occur, but access could also be denied, given the nature of the right to data protection (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 principle of data minimization, in accordance with the which *"the 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 the municipal information it includes certain personal data, without the consent of those affected, must be linked necessarily to the exercise of the functions that correspond in each case to the councilor in question treatment, in the terms provided for in the local regime legislation (they are part of the governing bodies or no).

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 have attributed 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 even the motion of censure, which is attributed to them by the local regulations.

On the other hand, the minimization principle requires a weighting exercise, in order to evaluate them implications that, in each case, the exercise of the councilors' right of access to information may have for the rights of the affected persons, taking into account, for this purpose, the circumstances of the specific case, the personal data contained in the information requested, the intended purpose and the terms with which the request is made or the possible subjects affected, among other aspects.

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.

v

Prior to the analysis of the request made by the councillor, it is important to take into account the fact that the documentation to which he intends to access belongs to the periods 1885-1890, 1918-1921, 1957-1959 and 1968-1969. To this end, it is important to bear in mind that, in accordance with the data protection regulations, the object of protection is information relating to identified or identifiable natural persons, in the terms provided for in article 4.1 of the RGPD. As recognized in Recital 27 of this Regulation, information relating to deceased persons must be understood as excluded from this protection:

"This Regulation does not apply to the protection of personal data of deceased persons.
Member States are competent to establish rules relating to the treatment of their personal data."

At the same time, article 2.2.b) of Organic Law 3/2018, of December 5, on the protection of personal data and guarantee of digital rights (hereinafter LOPDGDD), provides that this organic law will not apply to the processing of data of deceased persons, without prejudice to the provisions of article 3, which broadly recognizes the right of access, rectification and deletion to persons linked to the deceased, as long as the deceased person has not expressly prohibited or as established by law.

Therefore, and without prejudice to the fact that the right to privacy (provided in Article 18.1 EC) may extend beyond the death of a person, in the terms recognized by Organic Law 1/1982, of 5 May, of Civil Protection of the right to honor, to personal and family privacy and to one's own image (arts. 4 to 6), the protection provided by the data protection regulations expires with the death of the person.

Consequently, access to information relating to deceased persons would not be contrary to the RGPD and the LOPDGDD, given that they would not be within the scope of application of these regulations.

VI

First of all, the councilor requests to consult the register of deaths contained in the municipal archive for the years 1885-1890, 1918-1921, 1957-1959 and 1968-1969. In accordance with what has been provided above, to the extent that the information contained affects the data of deceased persons, the data protection regulations would not prevent granting access.

However, without prejudice to the above, access to the death register can also lead to knowing information relating to non-deceased third parties. In this sense, the councilor has requested access to the register with regard to different periods of time, which means that the content of the registrations could vary to the extent of what is provided by the regulations in force at any given time.

On the one hand, article 79 of the Provisional Civil Registry Law, published in the Madrid Gazette on June 20, 1870, and valid until December 31, 1958 (inclusive) in accordance with the second final provision of the Law of June 8, 1957 on the Civil Registry, provides for the following:

"In the registration of the death, they will express, if possible, [...]:

1.º The day, time and place in which the death had occurred
2.º The name, surname, age, nature, profession or trade and domicile of the deceased, and of his spouse if he was married.
3.º The number, surname, domicile and profession or office of their parents if legally they could be designated, stating whether they are living or not, and of the children they had.
4.º The illness that has caused the death
5.º Whether or not the deceased has left a will, and if so, the date, town and Notary in which it was granted
6.º The cemetery where the corpse must be buried"

On the other hand, subsequently the Law of June 8, 1957 on the Civil Registry, provided in article 81 that "[...] *the inscription certifies the death of a person and the date, time and place in what happens".* At the same time, article 280 of the Decree of November 14, 1958 approving the Civil Registry Law Regulation provides that the death registration will specifically state:

"1.º The mentions of the identity of the deceased.
2. Time, date and place of death.
3.º Number that is assigned in the legacy to the part or proof"

In accordance with the aforementioned regulations, the registrations of deaths carried out before January 1, 1959 would contain the identifying information, address and profession of the deceased person's spouse, parents and children, if applicable. Subsequently, the regulations only provide for the need to record the data relating to the identity, date and place in which the death occurred.

Therefore, with respect to registrations after January 1, 1959, they would only contain information about the deceased person. As such, data protection regulations would not prevent access to this information.

With regard to registrations prior to January 1, 1959 (mainly for the period requested between the years 1957-1958), apart from the data of the deceased person, there would also be data of third parties (identity, address and profession of the spouse, parents and children of the deceased person, if applicable). Therefore, it will be necessary to see whether the protection of the personal information of these affected third parties should prevail over their right of access to the information.

In the case at hand, it is important to highlight the time that has passed in the documentation to which access is sought, since more than fifty years have passed since the deaths were registered. In the case of the first two periods referred to in the query, more than a century.
As a consequence, it should be noted that the information is likely to also correspond to deceased persons. And in the case of living people, the information relating to the identification of the domicile and professional data of the affected persons is likely to be information that has not been updated because there has been a change of domicile or profession.

This circumstance, that of the time that has passed, together with the fact that has passed and the fact that the councilor can also by other means have access to information contained in the Municipal Register of Inhabitants and especially because no special risks for people can be appreciated affected, it can be concluded that the interference with the right to data protection of the affected family members contained in the register would be minimal and would not justify the City Council having to carry out a complex task aimed at the application of mechanisms and guarantees in order to obstruct or hide the personal data of those affected from all the registrations that were recorded
to the register of deaths, a fact that turns out to be not proportional considering the minimum level of intrusion on the rights of the people affected.

Separate mention deserves the fact that article 79 of the Law of 1870, in force until January 1, 1959, it also provided for the need to record the disease that caused the death if it is known, health data which has a regime of special protection from article 9 of the RGPD, given that this information although in principle it only refers to the deceased person, in certain cases, in hereditary diseases, it can give us information about the health of their descendants.

Especially with regard to the first two requested periods, the state of science at the time of registration may cast doubt on the accuracy of the data relating to this disease (Article 5.1.d RGPD). However, it cannot be ruled out that in some cases the spread of any such disease recorded in the register (whether it is the result of a more or less accurate diagnosis) could end up harming the descendants of the deceased person who are still alive This is information that is part of the special categories of data, to which special protection must be granted. It must be taken into account, on the other hand, that the councilor does not present any specific reason that justifies the relevance of this data. For this reason, in the event that the cause of death is any data relating to hereditary diseases, access to this information should be avoided.

Given what has been explained, it must be concluded that the data protection regulations do not prevent the councilor from being granted access to the register of deaths for the years between 1885-
1890, 1918-1921, 1957-1959 and 1968-1969, except for the data relating to the cause of death, when it consists of a hereditary disease.

VII

The councilor also requests the consultation of the minutes books corresponding to the same periods.

In the same way as in the previous case, the content of the information to which it is intended to access may vary depending on the regulations applicable at any given time. For this reason, it is necessary to carry out an analysis regarding the minimum content that can be contained in the aforementioned documents.

To this end, firstly, the Municipal Law of October 2, 1877, published in the Gazette of
Madrid on October 4, 1877, which provides for the following in articles 107 and 110:

"Art. 107. For each session, the Secretary of the City Council will draw up a minute in which the numbers of the President and other Councilors present, the matters that were discussed and

the resolution on them, the result of the voting and the list of the nominations when there were any.

The minutes will always include the opinion of the minorities and their grounds. The act will be signed by the Councilors who attended the session; by those present when they are aware of it, and by the Secretary.

The minutes of the opening session of each Town Hall will be signed by all those who attend, expressing those who do not know how to sign.

[...]

Art. 110. The previous rules will apply to the minutes and sessions of the Municipal Board. Yes they will keep their records in books separate from those of the City Council and with similar formalities, precautions and requirements, except as otherwise provided by this law."

The Municipal Law of October 2, 1877 was in force until the approval of the Municipal Statute of 1924, so for the purposes at hand, acts included in the periods between 1885-1890 and 1918-1921.

Regarding the acts between the years 1957-1959 and 1968-1969, it is necessary to refer to articles 304 and 305 of the Decree of December 16, 1950 by which the articulated text of the Local Government Law was approved of July 17, 1945. These articles were confirmed as definitive through the Decree of June 24, 1955 approving the articulated and revised text of the Local Government Basic Laws of July 17, 1945 and of December 3, 1953, and were in force until the approval of Law 7/1985, of April 2, Regulating the Bases of the Local Regime.

Articles 304 and 305 provide the following:

"Art. 304. For each session, the Secretary of the Corporation will issue minutes that must include the date and time it begins and ends, the numbers of the President and the members present; the matters treated; the agreements adopted with a summary of the opinions expressed, and the expression of the votes.

Art. 305. 1. The minutes books, solemn public instruments, will bear on all their pages the rubric of the President and the seal of the Corporation.
2. The agreements that are not contained in the said books, which must be leafed, will not be valid"

Given the above, the minimum content of the acts requested by the councilor does not vary substantially between what is provided for in the regulations of 1877 and that of 1945. In this sense, the minimum content will contain personal data of persons who are members of the corporation or their service (the name of the president or mayor and the members or councilors attending) or of people related to the matters dealt with.

As has already been explained, the data protection regulations exclude data relating to deceased persons from its scope of protection, so the analysis carried out below must be considered only with respect to those relative data to identified natural persons or

identifiable who have not died. In other words, in the records containing data on deceased persons (probably all those relating to the years 1885-1890 and 1918-1921), it can be concluded from the outset that the regulations do not hinder facilitating access to the councilor

With regard to the acts comprised between the years 1957-1959 and 1968-1969, it must be taken into account at the outset that the identification data of the members of the governing bodies of the local body would remain subject to the active advertising regime provided for by the 'article 9.1.b) of the LTC, which provides in relation to transparency in the institutional organization and administrative structure that the administration must make public, among others, its organizational structure including the identification of those responsible for its bodies. In line, on the other hand, article 24.1 of the LTC also provides with respect to the right of access to public information that access must be given to information directly related to the organization, operation or public activity of the administration, when it contains merely identifying personal data, except that the protection of personal data or other constitutionally protected rights must prevail.

Consequently, the transparency legislation constitutes a rule enabling access to the identification data of the president and the members or councilors in attendance and also of the staff of the local body included in these acts for their participation in the plenary session, unless compete
some special circumstance regarding the protection of a specific affected person that justifies the omission of their data.

With regard to the rest of the information contained in these acts, it should be borne in mind that the councilor states in his consultation that he is carrying out a study relating to the municipality.

It should be borne in mind that article 5.1.b) of the RGPD provides that personal data will be collected *"[...] with specific, explicit and legitimate purposes, and will not be subsequently treated in a manner incompatible with said purposes; in accordance with article 89, section 1, the further processing of personal data for archival purposes in the public interest, scientific and historical research purposes or statistical purposes will not be considered incompatible with the initial purposes ("limitation of the purpose") ".*

Article 89 of the RGPD, on the other hand, provides that *"the treatment for the purposes of [...] scientific or historical research [...] will be subject to adequate guarantees [...]. These guarantees will require that technical and organizational measures are available, in particular to guarantee respect for the principle of minimization of personal data. Such measures may include pseudonymization, provided that in that way said ends can be achieved.*
As long as those goals can be achieved through further processing that does not allow or no longer allows the identification of the interested parties, those goals will be achieved in that way.

Although, from a strictly academic point of view, there could be doubts as to whether in the case at hand the intended purpose of the councilor is historical research, given the time that has passed, and to the extent that the councilor's objective is related to the fact of carrying out a study related to the history of the municipality in which he holds his position, this purpose could be considered historical, especially if with this inquiry what is intended to be investigated or known are the decisions adopted in the passed by the governing bodies of the local body (as would be the case of access to the records) and which in certain cases may affect the management of the municipality.

It is also important, on the other hand, to take into account the fact that the plenary sessions are public, and their proceedings are subject to public dissemination (art. 10 of law 29/2010), so it would not be justified to limit to its general access, since it would not be proportionate to limit what the regulations foresee that can be known from the face-to-face attendance (although on certain occasions certain parts of the session may not be public or it may be necessary to omit certain information when the proceedings are broadcast).

This leads to the conclusion that in principle access should be given to the information contained in these acts, unless in some of them there is information on living persons that is part of the special categories of data in Article 9 RGPD (" *those that reveal ethnic or racial origin, political opinions, religious or philosophical convictions, or trade union affiliation, and the treatment of genetic data, biometric data aimed at uniquely identifying a natural person, health-related data or relative data to the sexual life or sexual orientation of a physical person.").* This may be particularly likely with regard to the proceedings of the Board of Governors.

In relation to these data, it should be borne in mind that article 9.2.j) of the RGPD provides that the treatment of these can be carried out when this *"[...] is necessary for the purposes of [...] scientific investigation or historical […], in accordance with article 89, section 1, on the basis of the Law of the Union or of the Member States, which must be proportional to the objective pursued, essentially respect the right to data protection and establish appropriate and specific measures to protect the interests and fundamental rights of the interested party."*

Consequently, this circumstance could act as a limit to the councilors' right of access to the disputed information, to the extent that the relevance of this information for the purpose intended by the councilor is not sufficiently proven.

VIII

Finally, the councilor requests access to the municipal correspondence in the periods between the years 1885-1890, 1918-1921, 1957-1959 and 1968-1969.

It should be borne in mind that in the terms in which the request is formulated, the councilor would be requesting access in a generalized and indiscriminate manner to all the correspondence between the years included in the previously mentioned periods, without specifying what the specific information is which I would be interested in accessing.

As a consequence, the correspondence documentation could contain data of a different nature, not only special categories of data referred to in article 9 RGPD, but also other data that may fall within the circle of personal or family privacy , the right to honour, data included within this category with a specific regime (those relating to administrative or criminal offences), or deserving of a special reservation or confidentiality in view of the concurrence of certain qualified circumstances (for example , situations of social vulnerability, data on minors, data related to gender violence, the possibility of drawing up socio-economic profiles, 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.

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 bearing in mind that when the affected people are very numerous, this can lead to a series of problems to be able to attend to the access request with the due guarantees, in particular to assess, case by case, whether the protection of personal data should prevail or the right of councilors to access municipal information.

Only a case-by-case examination of the content of the correspondence would allow us to analyze the degree of compliance with data protection regulations in granting access. This without prejudice to being able to deliver the documentation relating to deceased persons, or that, if the person requesting more specific the information to which he wants to access, a weighting can be done on a case-by-case basis, taking into account both the interest of the councilor and the effects that can be derived from access to this specific documentation.

In any case, and with the information available, it would not appear to be in line with data protection regulations to facilitate indiscriminate access to the correspondence relating to the requested time periods.

IX

Finally, it must 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, aside from duty of reservation imposed by 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 RGPD.

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) RGPD), 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 RGPD, even though the access to personal data was initially considered legitimate.

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

For its part, in accordance with the principle of integrity and confidentiality (Article 5.1.f)) RGPD *"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 you*

loss, destruction or accidental damage, through the application of technical or organizational measures

appropriate."

Conclusions

Data protection regulations do not prevent councilors from accessing the register of deaths corresponding to the years 1885-1890, 1918-1921, 1957-1959 and 1968-1969, except for the health data that may be included (specifically data on hereditary diseases from registrations prior to January 1, 1959).

With regard to the minutes books, access to the minutes book must be given, unless it contains special categories of data of the people who are affected by the adopted agreements.

In relation to the correspondence relating to the same periods, it would not be in line with data protection regulations to indiscriminately facilitate access to the correspondence of living persons, but a case-by-case analysis must be carried out, in view of the interest of the councilor in access and the type of information to which the correspondence refers.

Barcelona, February 3, 2020