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CNS 13/2021

Opinion in relation to the query made by a deputation regarding the request for access to a disciplinary file by the alleged offender

A consultation from a deputation is presented to the Catalan Data Protection Authority in which it is requested that the Authority issue an opinion in relation to the request for access to a disciplinary file by the alleged infringer.

In particular, the consultation is accompanied by a report setting out the factual background, and in which the following is set out:

- That a file of reserved information was processed following the report of acts allegedly committed by a teacher of an educational center of a deputation, which could constitute a serious administrative infraction. In particular, the deputation refers to the alleged commission of an offense related to "an abuse of authority and a lack of consideration towards the [...] complainants at the root of his behavior of physical gestures [.. .] and to send messages with poems and hugs or kisses".

- In this process, statements were taken from those reporting the events as well as from other witnesses, all of whom are of legal age, and who were guaranteed that the necessary measures would be taken to protect their anonymity.

- That it was decided to initiate disciplinary proceedings, and later it was provided to include the whole documentation referring to reserved information.

- That the alleged infringer requested a copy of the files, access that the provincial government authorized, but after anonymizing the documentation contained in the reserved information, since he considered that they contained data that required special protection, with reference to the data relating to the "[...] name and surname of the people making the complaint or of third parties referred to by them; data relating to health, etc.".

- That the alleged offender stated that "[...] the fact that the documents were anonymized [...], that he could not obtain copies of the rest of the documentation that had not been given to him, that he could not take photographs to the anonymized documents, and that only with the annotations he can take in the moments he has access to the files, it was very difficult to defend him and that creates defenselessness for him".

- That the deputation decided to suspend the disciplinary procedure in order to carry out complementary actions to resolve whether the action of anonymizing the data conforms to the law, and among which the present query is formulated.

In relation to these facts, the deputation proposes "[...] how to correctly satisfy the right to legal defense with careful compliance with data protection regulations, taking into account the special circumstances that come into play in this file, where it has special

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the importance of protecting the identity of potential victims [...] and that these people have reported and testified relying on the confidentiality of their identifying dates."

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

I

(...)

II

Based on the information that has been transferred by the delegation, it appears that the main doubt lies in how to guarantee the right to the defense of the alleged offender, and especially with regard to the right of access in relation to the party of confidential information included in a disciplinary file, and at the same time protect the personal data of complainants and witnesses, who would have been guaranteed that the necessary measures would be taken to maint

In accordance with the provisions of articles 2.1 and 4.1 of Regulation (EU) 2016/679 of the Parliament and of the Council, of April 27, 2016, relating to the protection of natural persons with regard to the processing of personal data and the free circulation of this data and which repeals Directive 95/46/CE (General Data Protection Regulation), hereinafter RGPD, the data protection regulations apply to the treatments that take place in term on any information "about an identified or identifiable natural person (the "data subject"); 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".

Taking into consideration, moving forward to the analysis that will be carried out, which will also refer to the figure of the interested party from the point of view of the regulations of the administrative procedure, in order to refer to the interested party in terms of data protection regulations will refer to the affected party.

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, loyal and transparent in relation to the interested party and, in this sense, the RGPD establishes the need to participate in some 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".

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

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 official 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 (henceforth, LTC), which recognizes people's right of access to public information, understood as such "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" (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).

In the present case, to the extent that the query raised is related to the alleged infringer's access to reserved information incorporated in a disciplinary file, it seems clear that this documentation must be considered public from the point of view of the article 2.b of the LTC and, as such, is subject to the right of access (article 18 of the LTC), being documentation in their possession as a result of the exercise of their powers.

It should be borne in mind that, as can be seen from the information transferred, the disciplinary file and, in particular, the reserved information, contains personal information related to the complainants, as well as to the witnesses. For this reason, it is necessary to examine the possible limitations that may occur in relation to the requested access with regard to the right to the protection of personal data of the potential affected.

III

It should be noted that this Authority has previously had the opportunity to analyze the right of access to a file of reserved information (among others, in the opinion CNS 14/2018 or in the report IAI 10/2020, available on the web https://apdcat.gencat.cat).

For the purposes of this opinion, it should be noted that the reserved information file is regulated in article 275 of Decree 214/1990, of July 30, which approves the Regulations for staff at the service of local entities, which provide for the following:

"The competent body for the initiation of the disciplinary file [...] has the following powers:

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a) Order, in advance, the realization of reserved information. [...]"

These investigative actions are fundamentally aimed at determining, with the greatest possible precision, the facts likely to motivate the initiation of the procedure, the identification of the person or persons who may be responsible and the relevant concurrent circumstances.

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). And this even affects the person being investigated (among others, STSJC 1212/2005, of November 25).

Along these lines, the LTC expressly establishes the possibility of limiting or denying access to public information if its knowledge or disclosure entails a detriment to the investigation or sanction of the criminal, administrative or disciplinary offense in question (article 21.1.b)).

Consequently, while the prior information is being processed, its reserved nature must certainly prevail and the alleged infringer does not have the right to access its content. This would cover both the information about you contained in this reserved information, despite the regime of the right of access contained in article 15 of the RGPD, as well as other information referring to third parties, such as the origin of the information, aspects to which we will refer later.

On the contrary, to the extent that the investigation phase is concluded, its reserved or confidential character may lapse (STSJM 471/2006, of May 24), especially if it is agreed to initiate a sanctioning or disciplinary procedure , as it is in the particular case, since the regulations of the administrative procedure would be fully applicable.

For this purpose, and with regard to the documentation corresponding to the actions of reserved information, article 38 of Decree 243/1995, of June 27, which approves the Regulation on the disciplinary regime of the public function of the Administration of the Generalitat of Catalonia, also applicable to the staff of local bodies (article 237.1 of Decree 214/1990), foresees that the investigating body can agree to incorporate it into the disciplinary procedure.

IV

Without prejudice to the above, it is considered necessary to make a paragraph in which the deputation insists on the fact that during the confidential information procedure it committed itself to the complainants and witnesses that the necessary measures would be taken to guarantee their anonymity. In fact, it alludes to the fact that these people would have reported and testified, respectively, relying on the confidentiality of their identifying data.

Based on the information available, although the specific legal basis on which the deputation would have acquired this commitment to maintain the anonymity of the complainants and witnesses is unknown, and following the concurrent circumstances in the particular case, no can be discard

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possibility, and at the same time it may be conditioning with respect to the conclusions reached in the analysis of the consultation, that the complaint has been submitted through an internal complaints information system of the deputation, in case to have it, and the commitment was based on the provision of article 24.3 of the LOPDGDD whereby:

"3. The necessary measures must be taken to preserve the identity and guarantee the confidentiality of the data corresponding to the persons affected by the information provided, especially that of the person who brought the facts to the attention of the entity, in the event that has been identified"

In this sense, article 24 of the LOPDGDD provides for the following regarding the processing of this data:

> **"[...] 2. Access to the data contained in these systems is limited exclusively to those who, whether or not affiliated with the entity, exercise the functions of internal control and compliance, or those in charge of the treatment that are eventually designated for this purpose. However, access by other people, or even its communication to third parties, is lawful when it is necessary for the adoption of disciplinary measures or for the processing of judicial procedures that, if where appropriate, be appropriate. [...]**
>
> **4. The data of the person formulating the communication and of the employers and third parties must be kept in the complaints system only for the time necessary to decide on the origin of starting an investigation into the facts reported. In any case, after three months have passed since the introduction of the data, they must be deleted from the complaints system, unless the purpose of the conservation is to leave evidence of the operation of the crime prevention model by the legal person. Complaints that have not been acted upon can only be recorded in an anonymized form, without the blocking obligation provided for in article 32 of this Organic Law being applicable."**

After the period mentioned in the previous paragraph, the data can continue to be processed, by the body to which it corresponds, in accordance with paragraph 2 of this article, the investigation of the facts reported, and must not keep in the internal complaints information system.[…]"

As can be seen from this article, the necessary measures must be adopted to ensure that the data of the people who have informed the entities of facts that could be contrary to the regulations are confidential. This, except for the availability of the data for internal control and compliance functions in the entity itself, or when access or communication is necessary for the adoption of disciplinary measures or the processing of a procedure judicial

The data relating to the whistleblowers must be kept in the whistleblowing system until a decision is made on whether to initiate an investigation into the facts reported, with a maximum of three months from their introduction into the system. In the event that the facts are investigated, the regulations provide that the body to which the investigation of the reporting facts corresponds, whether for the adoption of disciplinary measures or for the processing of a judicial procedure, may decide to continue dealing their data, but in any case should no longer be kept in the internal complaints information system itself.

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In the case at hand, it should be borne in mind that the request for access to the disciplinary file by the alleged offender would have occurred subsequent to the procedures referred to in article 24 of the LOPDGDD. That is to say, at the time of the consultation, a disciplinary procedure had already been initiated, the regulations on administrative procedure being fully applicable.

It should be noted that article 24 of the LOPDGDD would not apply to witnesses to the extent that their forecasts affect the information of the persons reporting certain facts, and not to the statements that have been taken as a result of having started the investigation of the facts reported or during the processing of the procedure.

V

To the extent that the actions of previously reserved information concluded and a disciplinary procedure was initiated, the person under investigation becomes an interested party in the administrative procedure, in accordance with the provisions of article 4.1 and 64.1 of Law 39/2015, of October 1, on the common administrative procedure of public administrations (LPAC).

The first additional provision of the LTC states that: "1. The access of those interested to the documents of the administrative procedures in progress is governed by what is determined by the legislation on the legal regime and administrative procedure. [...]"

Article 53.a) of the LPACAP provides that interested persons have the right to access and obtain copies of the documents contained in the procedures in which they have this condition.

In similar terms, article 26 of Law 26/2010, of August 3, on the legal regime and procedure of the public administrations of Catalonia, by which "citizens who have the status of persons interested in a procedure administrative in processing have the right to access the file and obtain a copy of the documents that are part of it. If the documents are in electronic format, citizens have the right to obtain electronic copies."

Specifically in the disciplinary field, article 285 of Decree 214/1990 establishes that "the list of charges must be notified to the accused and he must be granted a period of ten days so that he can answer it, with the allegations it deems appropriate for its defense and with the contribution of the documents it deems of interest. In this procedure, he must request, if he considers it appropriate, the practice of the evidence he believes necessary for his defense, as well as access to the entire file, by himself or through his legal representative."

The applicable administrative procedure legislation recognizes the right of the alleged offender to access the information contained in the disciplinary file and to obtain copies in fairly broad terms. This does not mean, however, that this right of access is an absolute and unlimited right. It must be borne in mind that if it comes into conflict with other rights, as in this case with respect to the fundamental right to the protection of personal data (Article 18.4 of the Spanish Constitution), it will be necessary to weigh the different rights at stake, in order decide which should prevail and to what extent.

This is, in fact, recognized by article 82.1 of the aforementioned LPAC by establishing that the obtaining of copies or access to the file of the persons interested in the hearing procedure must take into acco

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limitations foreseen if applicable in the transparency legislation. In the same line, article 51 of Law 26/2010 is pronounced, in regulating the hearing procedure for interested persons. This does not mean, however, that these limitations are not equally applicable at any other time of the procedure.

On the other hand, and regardless of the provisions of the administrative procedure regulations to which we have referred, it is also necessary to take into account that article 15 of the RGPD provides for the right of access of those affected by a treatment to the your own information held by the data controller, with the limit of not negatively affecting the rights and freedoms of other people.

Therefore, and with regard to the limits to public information referred to in article 82 LPAC, it is necessary to attend to the provisions contained in article 20 et seq. of the LTC, and in particular in relation to the regime of data protection, articles 23 and 24 of the LTC. It is also necessary to attend to the provisions of article 15 of the LT, in what is not provided for by the LTC.

VI

As can be seen from the report sent with the consultation, in addition to the data relating to the alleged infringer, the documentation relating to the reserved information contains data relating to the complainants and witnesses. In particular, the deputation refers to identifying data (name and surname), as well as to "[...] data relating to health, etc.[...]".

Prior to the analysis of the merits of the matter, it is appropriate to point out that the terms with which the deputation refers to the data that will be contained in the disciplinary file are not entirely clear. Firstly, because although it refers to the fact that the reserved information contains data relating to health, it does not specify who the affected person would be, although it seems that they correspond to the complainants, since in the report sent with the consultation it is It attributes to them the status of alleged victims of the events reported. And secondly, it is also not clear which other categories of data would be affected by the alleged infringer's access request, taking into account that the enumeration offered ends with a generic "etc.". Consequently, the analysis will be carried out solely in relation to the data which, based on the information provided with the request for opinion, can be deduced to contain reserved information.

In any case, with regard to the alleged offender's right of access to the data that refer to him and to the identifying data (name and surname) of the complainants and witnesses, it is necessary to comply with the provisions of article 15 of GDPR:

"1. The interested party will have the right to obtain from the controller confirmation of whether or not personal data concerning him or her are being processed and, in such case, the right to access personal data and the following information:

**a) the purposes of the
treatment; b) the categories of personal data in
question; c) the recipients or the categories of recipients to whom the personal data was communicated or will be communicated, in particular recipients in third parties or international organizations;**

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d) if possible, the expected period of personal data conservation or, if not possible, the criteria used to determine this period; e) the existence of the right to request from the person in charge the rectification or suppression of personal data or the limitation of the treatment of personal data relating to the interested party, or to oppose said treatment; f) the right to present a claim before a control authority; g) when the personal data has not been obtained from the interested party, any available information about its origin; h) the existence of automated decisions, including profiling, referred to in article 22, sections 1 and 4, and, at least in such cases, significant information about the logic applied, as well as the importance and expected consequences of said treatment for the interested party. […]".

In accordance with the provisions of this article, the affected person has the right to confirm whether a data controller is processing his data and, if applicable, to access the information relating to him and to know, among others, the origin of the information if they have not been obtained directly from the affected person.

This means, in the case at hand, that in accordance with the regulations on the protection of personal data (art. 15 RGPD) the alleged infringer not only has the right of access to the information about his person that appears in the disciplinary file, and that has been provided or generated during the course of the procedure, but taking into consideration that the information originates in the denunciation of the facts, as well as the statements of the complainants and witnesses, but that this right also includes knowing the identity of the people who provided the information. This information would form part of your right to know the origin of the data. All of this, unless there is some element that, depending on the personal situation of these people, must lead to a limitation of this access.

Taking into account the nature and seriousness of the facts attributed to the reported person, and the consequences that could affect his professional, social and even intimate sphere, in the event that he is sanctioned as responsible for the facts , it seems relevant for his legal defense to be able to know the identity of the reporting person and the witnesses who wou

It may even be relevant to know the identity of the people who communicated this information to the extent that the investigating body has incorporated the documentation of the reserved information into the disciplinary file, including the complaint and statements. Therefore, this documentation is part of the elements that can be taken into account for the formulation of a resolution proposal, and to the extent that they are taken into account as evidentiary elements, it may be relevant to access them for the defense of the alleged infringer .

To this end, article 53.1.e) of the LPAC, provides that the interested parties have the right "to make allegations, use the means of defense admitted by the Legal Ordenamiento, and provide documents at any stage of the procedure prior to the procedure of hearing, which must be taken into account by the competent body when drafting the resolution proposal."

It must be agreed, however, that all this will be so unless there are circumstances in the case at hand that justify the limitation of this access.

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To this end, it is appropriate to take into consideration that the deputation insists in its report on the need to attend to the special circumstances that are present in the file, with reference to the nature of the facts that are attributed to the alleged offender, and the fact that complainants and witnesses had reported and declared, respectively, relying on the confidentiality of their identifying data.

In accordance with everything that has been highlighted above, the confidentiality of the identifying data of reporting persons and witnesses is not an absolute right, and may be limited to the extent that it may come into conflict with another right , as it is in this case with regard to the right of access to the file by the alleged infringer.

Despite the fact that in the case at hand, and given the information that is available, it is considered that the right of access of the alleged infringer to know the identifying data of the complainants and witnesses prevails over the right of data protection of these, in relation to their right of defense, the fact that the deputation made a commitment to them that it would take the necessary measures to guarantee their anonymity cannot be ignored.

Certainly this conclusion affects the privacy expectation of complainants and witnesses, since the guarantee of anonymity seems to have been decisive for the filing of the complaint and the statements. Regarding this, it would be appropriate that at the time of informing the affected persons about the guarantees of confidentiality, they were also clearly informed about the uses of the information, about the possible access by third parties and about the possibility of exercising the right of opposition (art. 21 RGPD), among the other aspects required by the RGPD.

For this reason, it would be necessary that prior to the resolution of the alleged infringer's request for access to the disciplinary file, the deputation should inform the complainants and witnesses of this circumstance so that they can assess their situation and, consequently, they can present allegations or exercise their right of opposition regarding the access of the reported person. Ultimately, it is necessary to give a hearing to the complainants and witnesses so that their allegations can be evaluated in order to find out if there are circumstances that justify the limitation of access.

This communication before deciding on the access would find foundation both in article 21 of the RGPD ("The interested party will have the right to object at any time, for reasons related to his particular situation, to what personal data that concerns him is objected of a treatment based on the provisions of article 6, section 1, letters e) of), including the elaboration of profiles on the basis of said provisions. The person in charge of the treatment will stop processing the personal data, unless it proves compelling legitimate reasons for the treatment that prevail over the interests, rights and freedoms of the interested party, or for the formulation, exercise or defense of claims.") as in the general regulations of administrative procedure (art. 82 LPAC).

In another order of things, and in relation to the data relating to the health of the complainants, it is necessary to take into account the provision of article 23 of the LTC from which:

"Requests for access to public information must be denied if the information sought contains particularly protected personal data, such as those relating to [...] health and life

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sexual [...] unless the person concerned expressly consents to it by means of a written document that must accompany the request.".

In turn, article 15.1 of the LT provides that "[…] If the information includes personal data that refers [...] to health or sexual life, [...] access may only be authorized in case of that is counted with the express consent of the person affected or if that person was protected by a rule with the rank of law."

In accordance with these provisions, access to public information that contains data relating to health must be denied from the outset, unless the affected party has given their express consent or the communication is protected by a rule with a range of law

However, in the case at hand we can find ourselves precisely in this last case. In other words, that the provisions contained in the laws justify the disclosure of this information. In this sense, as we have already said in general above, the provision of article 53.1.e) of the LPAC would be relevant here as well to guarantee the right of defense (article 24.1 EC) of the alleged infringer. The fact that access to health data may be relevant to the alleged infringer's defense would justify their access to information, even if it is specially protected, such as health data.

In this sense, it is appropriate to take into account the principle of data minimization provided by the RGPD in article 5.1.c) and from which the processing of data must be limited to the minimum necessary to achieve the intended purpose .

Consequently, it may be relevant to have or know the information relating to the identification, and also the information relating to the health of the complainants, to the extent that this information has been incorporated into the procedure and constitute evidentiary elements, with respect to which the person reported must exercise his right of defense. This is without prejudice to the fact that, in advance, it is necessary to make an assessment, taking into account the eventual circumstances that the complainants may allege in the hearing procedure, in order to avoid that depending on the concurrent circumstances, this limitation of the rights of third parties is not disproportionate.

Conclusions

The alleged offender has the right to access all the information about him that appears in the disciplinary file, including the information provided or generated in the course of the reserved information that has been included in the disciplinary file, including the identity of the people who have provided said information or health data about these people, when it is relevant for the right of defense, without prejudice to the limitations that may be relevant in an exceptional way when the circumstances alleged by these people require preserving their confidentiality

Barcelona, March 12, 2021