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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 against a public sector foundation for the denial of access to the remuneration information of the management staff

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 against a foundation for the denial of access to the remuneration information of the management staff.

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 7, 2020, the works committee of the Foundation (...) presents an instance to this entity in which it requests:

"(...) the full remuneration of the following people from the management team, including base salaries, fixed and variable supplements: Director General, Director of People Management, Director of University Services and Processes and Director of Business and Entrepreneurship ."

2. On July 31, 2020, the Foundation issues a resolution in relation to this access request in the following terms:

*"**First.** As of 07/20/2020, the Foundation (...) has a current contract outside of the agreement, signed on July 24, 2018, which aims to hire the Foundation's general manager.*

***second** That the remuneration linked to the contract referred to in point one was already reported to the works committee on February 27, 2019 (...).*

***third** That there is no other position considered as a manager within the Statutes of the Foundation.*

***fourth** That according to the Organic Data Protection Law and the level of protection of the personal data requested, these cannot be provided."*

3. On September 21, 2020, the works committee of the Foundation (...) presents a new request to this entity in which it reiterates and expands the access request of July 7, 2020, in the following terms:

"1. That the Committee be provided with the information requested in the letter of July 7, 2020 (...), excluding the salary of the Director General that we already have and adding to it the three managements of the University Schools.

2. The amount paid by the Foundation (...) in 2019 in terms of variable annual remuneration, per diems, wages in kind, overtime and any other concept for the general manager and the other managerial positions.

(...)"

The company committee adds in this letter that, in accordance with the regulations of the Foundation's Board of Trustees for the selection, designation and appointment of single-person governing bodies and the memory of the Foundation (...) for the 2018- 2019, in his opinion, there are other management positions in the Foundation, in addition to that of director general.

4. On November 11, 2020, the Foundation (...) issues a resolution in relation to this new access request in the following terms:

***“First.** That the list of jobs for which information related to remuneration data is requested are not considered managerial positions according to the conditions set by the GAIP.*

***second** Since there are no managerial positions according to these parameters and in accordance with the Organic Data Protection Law and the level of protection of the personal data requested, these cannot be provided.*

***third** In relation to the remuneration of the General Management, these are those that were already notified to the works committee on July 31, both in the fixed part and in the variable part.*

In relation to per diems, the general policy of the entity is strictly followed and as regards remuneration in kind, the use of a parking space is exclusively included.”

5. On December 10, 2020, the works committee of the Foundation (...) presented a claim to the GAIP against the Foundation for the denial of the requested public information.

6. On December 20, 2020, the GAIP sent the claim to the Foundation (...), requiring it to issue a report on which to base its positions, as well as the complete file relating to the request for access to public information, the identification of third parties affected by the requested access, as well as the person or persons who will represent them at the mediation session.

7. On January 8, 2021, 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 data protection

personal data, the Commission must issue a report to the Catalan Data Protection Authority, which must be issued within fifteen days.

For this reason, this report is issued exclusively with regard to the assessment of the incidence that the requested access may have with respect to the personal information of the persons affected, understood as any information about an identified or identifiable natural person, directly or indirectly, in particular through an identifier, such as a name, an identification number, location data, an online identifier or one or more elements of physical, physiological, genetic, psychological, economic, cultural or social security of this person (article 4.1 of Regulation 2016/679, of April 27, 2016, relating to the protection of natural persons with regard to the processing of personal data and the free circulation of such data and by which repeals Directive 95/46/EC (General Data Protection Regulation, hereafter RGPD).

Therefore, any other limit or aspect that does not affect the personal data included in the requested information is outside the scope of this report.

The deadline for issuing this report may lead to an extension of the deadline to resolve the claim, if so agreed by the GAIP and all parties are notified before the deadline to resolve ends.

Consequently, this report is issued based on the aforementioned provisions of Law 32/2010, of October 1, of the Catalan Data Protection Authority and Law 19/2014, of December 29, of transparency, access to public information and good governance.

In accordance with article 17.2 of Law 32/2010, this report will be published on the Authority's website once the interested parties have been notified, with the prior anonymization of personal data.

II

Article 4.2) of the RGPD considers *"treatment"*: any operation or set of operations carried out on personal data or sets of personal data, either by automated procedures or not, such as collection, registration, organization, structuring, conservation, adaptation or modification, extraction, consultation, use, communication by transmission, diffusion or any other form of enabling access, comparison or interconnection, limitation, deletion or destruction."

The RGPD provides that all processing of personal data must be lawful (Article 5.1.a)) and, in this sense, establishes a system of legitimation of data processing that is based on the need for one of the legal bases established in article 6.1 to apply. 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) has to be established by the Law of the European Union or by the law of the Member States that applies to responsible for the treatment.

The referral to the legitimate basis established in accordance with the internal law of the Member States concerned reference this article requires that the rule of development, when dealing with the protection of

personal data of a fundamental right, has the rank of law (Article 53 EC), as it has come to recognize article 8 of Organic Law 3/2018, of December 5, on the protection of personal data and guarantee of digital rights (hereinafter, LOPDGDD).

For its part, article 86 of the RGPD provides that *"personal data from official documents in the possession of some 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 they are applied in order to reconcile public access to official documents with the right to 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.

The LTC extends its subjective scope of application, among others, to public sector foundations (article 3.1.b).

According to the Register of Foundations, the Foundation (...) was established in 1999, under the name of (...), by the Town Council of (...) and (...).

In accordance with the deed of incorporation of the Foundation (...), published on the corporate website of the City Council of (...), the City Council participates in the foundation capital with a contribution of €18,030.36 and (...) participates with a contribution of €12,020.34.

Given the majority participation of the City Council of (...) in the entity's capital, it is understood that the Foundation (...) is, for the purposes of transparency, a public sector foundation, and therefore, included in the entities listed in article 3.1.b) of the LTC.

In fact, the Foundation itself (...), in the resolutions issued in response to the access request that is the subject of this claim, recognizes that it is included within the scope of application of the LTC, in accordance with article 3.1.b) of this law.

As a subject bound by transparency legislation, it is therefore subject to compliance of the obligations established therein, and this includes both active advertising obligations provided for in articles 8 to 15 of the LTC, such as those that may arise from the exercise of the right of access provided for in article 18 of the LTC.

The aforementioned 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"*.

The remuneration information of the Foundation's staff is public information for the purposes of article 2.b) of the LTC and, therefore, subject to the regime of the right of access (article 18 LTC).

This right of access, however, is not absolute and may be denied or restricted for the reasons expressly established in the laws. Specifically, and with regard to the right to the protection of personal data, it is necessary to take into account the limitations and criteria provided for in the transparency legislation (articles 23 and 24 LTC), and the principles of the personal data protection regulations.

III

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, access to the remuneration received for any concept (base salaries, fixed and variable supplements, per diems, wages in kind, overtime...) by "the management team" of the Foundation (...).

Specifically, the request refers to the Director General of the Foundation (...), the director of "People Management", the director of "University Services and Processes", the director of "Business and Entrepreneurship", and to the directors of the three University Schools of the Foundation (...).

In general, and from the perspective of the right to the protection of personal data, the information on the remuneration of a position or job makes it possible to draw up an economic profile of the person who occupies it, both in the professional field and in the social and economic field, and that's it in a direct way, facilitating the identification of the person who occupies the specific position, i.e. of indirectly, when it comes to places that can be related, by other means and without effort disproportionate, with the people who occupy them.

In principle, this information would not affect particularly protected data (in the terms provided for in article 23 of the LTC). Therefore, access requires balancing the public interest in the disclosure of information against the rights of affected individuals, as required by Article 24.2 of the LTC:

"2. If it is other information that contains personal data not included in article 23 (data specially protected), access to the information can be given, with prior weighting rationale of the public interest in disclosure and the rights of the affected persons. To carry out this weighting, the following circumstances must be taken into account, among others:

- a) The elapsed time.*
 - b) The purpose of the access, especially if it has a historical, statistical or scientific purpose, and the guarantees offered.*
 - c) The fact that it is data relating to minors.*
 - d) The fact that it may affect the safety of people.*
- (...)."*

For the purposes of this weighting, special consideration must be given to the fact that the person requesting access is the president of the company committee of the Foundation (...).

The Workers' Statute, approved by Royal Legislative Decree 5/2015, of October 23 (hereinafter, ET), attributes to the works committee, as a representative and collegial body of all the company's workers (article 63.1), certain functions for the exercise of which recognize the right to access certain information that may contain personal data.

Article 64.1 of the ET provides that *"the works council will have the right to be informed and consulted by the employer on those issues that may affect the workers, as well as on the situation of the company and the evolution of employment in the same, in the terms provided for in this article."* And he adds that information is understood as *"the transmission of data by the employer to the works committee, so that it is aware of a certain issue and can proceed to its examination (...)."*

Next, sections 2 to 5 of this article 64 of the ET contain specific forecasts in relation to the questions or matters on which the works councils have the right to receive information, some of them with a quarterly frequency (article 64.2 ET), others annually (article 64.3 ET) and others when appropriate (article 64.4 and 5 ET).

All this for the purpose of exercising, among others, the function of *"monitoring compliance with the current labor, social security and employment standards, as well as the rest of the agreements, conditions and company practices in force, formulating, in his case, the appropriate legal actions before the employer and the competent bodies or courts"* (article 64.7.1.a) ET).

It is worth pointing out, in view of the nature of the information requested, that this Authority has done so on previous occasions (among others, CNS 46/2019, CNS 41/2018 or CNS 28/2017, available on the website <https://apdcat.gencat.cat>) that, apart from the personal data that can be included in the basic copy of the contracts and that can be known by the works council in the legally established terms (articles 8.3.a) and 64.4 ET), in general, the provisions of the ET translate into a right of the works council to receive information on the various issues that are broken down in the precepts of the ET, without this rule clearly stipulating that this information is 'must link, individually, with each worker.

It is considered, in particular, that the right to obtain information on the situation of the company and the evolution of employment in the company - or on the evolution of remuneration - which the regulations (ET and TRLEBEP) recognize it is not equivalent to the bodies representing the workers to know the details of the remuneration of all the workers. Delivering this information, individually and associated with all workers, would exceed the forecasts of the ET and the TRLEBEP regarding the information that must be communicated to said representative bodies.

However, in the present case the works committee's request for information does not cover all the Foundation's workers (...), but refers to those people who, in their opinion, are part of the "staff manager" of the entity.

The LTC obliges public administrations - including, among others, the entities of article 3.1.b) of the LTC- to publish *"the remunerations, compensations and allowances, the activities and the assets of the members of the Government, of the senior positions of the Public Administration and of the **management staff** of the public bodies, societies, **foundations** and consortia, and the compensation they must receive when leaving to exercise the position"* (article 11.1.b).

There is no specific provision in the transparency legislation of what is to be understood by "personal manager", but taking into account what is established in additional provision 21^a of Law 2/2014, of 27 of January, of fiscal, administrative, financial and public sector measures, this obligation of active advertising would affect the remuneration received by *"people who hold positions or positions expressly qualified as managers in the rules for the creation or regulation of the entities in accordance with the exercise of functions of special managerial responsibility, understood as functions that*

they involve the sole or main dedication of the day, direct participation in the definition and execution of public policies, as long as they externally engage the organization, lead teams of people, manage and execute budgets and have responsibility for the fulfillment of objectives" (section 1.2).

In accordance with these forecasts, the information on all remunerations received by "management staff" of the Foundation (...) must be published individually on their website or headquarters electronic (Article 5 LTC) and should cover the full amount for any remuneration, compensation or allowance.

This would affect the remuneration received by the members of the Foundation's Board of Trustees (...), with functions of governance, administration, representation and management of the entity (Article 15 Statutes of the Foundation) but also, at least, those of the Director general of the Foundation, who is responsible for the exercise of management functions of the ordinary management of the foundation and the fulfillment of the powers delegated to him by the Board of Trustees and/or the presidency (article 32 Statutes), and those of the rest of persons referred to in article 33 of the Foundation's Statutes (this article establishes that the management staff of the Foundation will be appointed and dismissed by the general management).

To the extent that this remuneration information must be made public, there can be no doubt, from the perspective of the right to data protection, about the possibility of handing it over to the Foundation's works committee (...) in these terms.

IV

At this point, it should be noted that the works committee has requested to know *"the amount paid by the Foundation (...) in 2019 in terms of variable annual remuneration, per diems, wages in kind, overtime and any other concept of the general manager and the other managerial positions."*

In this sense, it is stated in the file that the Foundation (...) has given him information about the remuneration received by the persons who, at the time of issuing the resolution on the requested access, the entity considers "managerial staff": the General Manager of the entity.

Specifically, the Foundation would have reported on the fixed annual remuneration received, the maximum annual amount it could receive as variable remuneration, the compensation it could receive in the event of termination of the contract (if this is motivated by the Foundation's free will) and the remuneration received in kind. With regard to diems, it is only indicated that *"the general policy of the entity is strictly followed"* without further details.

In view of the transparency legislation (article 11.1.b) LTC), it is clear that the works council must also be able to access the amounts received as per diems (these would include the amounts that may have been credited as financial compensation to meet subsistence and accommodation expenses derived from the exercise of duties inherent in the position) or compensation (any other emolument received due to the provision of services to the foundation), as well as for overtime hours worked. If no amount has been received for these concepts, it would also be necessary to inform the works committee.

The works committee should also be able to access the amount paid as variable annual remuneration during 2019 as requested. Provide this information by way of

forecast, as the Foundation (...) has done, is pertinent when it comes to requests for information referring to the current financial year. However, once the financial year is closed and after evaluating the achievement of the objectives to which they are conditioned, it is necessary to report the amount paid for this concept.

With regard to the other positions indicated by the company committee in their application for access (the directors of "People Management", "University Services and Processes", and "Business and Entrepreneurship" of the Foundation (...), and the directors of the three University Schools), according to the file, the Foundation has not provided him with any remuneration information in this regard, arguing that these jobs are not considered "managerial staff" of the entity.

It should be noted that the Foundation (...) has published, in its transparency office, the document "*Regulations of the Board of Trustees of the TCMM Foundation for the selection, designation and appointment of single-person governing bodies of the Foundation*" (hereinafter, the Regulations).

This Regulation establishes "*the general principles and procedures that must govern the processes of selection, designation and appointment of the director general of the Foundation, **the directors of the university centers and the directors of the functional areas to be determined in the organizational chart of the Foundation** (...)*" (article 1).

Article 5 of these Regulations regulates the selection procedure for the directors of the Foundation's university centers (...). Section 4 of this precept provides the following:

*"4. The director or general director of the Foundation will assume the technical management of the ordinary selection process, which must be based on the express mandate of the Board of Trustees that will approve the basis of the competition. **According to article 33 of the Foundation's Statutes, the General Director is responsible for the proposal of appointment or dismissal to the position of center director.** The selection process must culminate, if appropriate, with the appointment by the chancellor of the affiliated University of the candidate."*

The aforementioned article 33 of the Foundation's Statutes (...), under the express name of "management staff", establishes that "*the management staff of the Foundation will be appointed and dismissed by the Management General.*"

According to these precepts, it seems that we are dealing with "managerial staff" who occupy the direction of the university centers of the Foundation (...).

Consequently, it is also necessary to recognize the works committee's access to the remuneration information requested on the directors of the three University Centers of the Foundation, which must include, remember, the full amount for any type of remuneration, compensation or diet (article 11.1.b) LTC).

With regard to the works committee's access to this same information referring to the positions of Director of "People Management", Director of "University Services and Processes", and Director of "Business and Entrepreneurship" of the Foundation, it seems that the same conclusion should be reached.

The aforementioned Regulation regulates, as we have seen, the procedures that must govern the processes of selection, designation and appointment of directors of the functional areas determined in the organization chart of the Foundation (article 1).

In this sense, article 6, relating to the "*selection of other management positions*", establishes that:

According to the institution's statutes, the appointment and dismissal of managerial positions of the Foundation's administration and services staff is the responsibility of the general director of the Foundation. The functions and number of these positions will be those determined in the organizational chart of the Foundation approved by the Board of Trustees of the Foundation (...).

In the organizational chart of the administration and services staff (PAS) published by the Foundation (...), in its transparency headquarters, there are, among other managerial positions, those of "Director of People Management" and "Director of University Services and Projects (SIPU)", which match the positions listed by the company committee in their application for access, and there is also the position of "Director of Transfer, Innovation and Company", which would seem to correspond to the position of director of "Business and entrepreneurship" indicated by the company committee.

In accordance with the Regulations approved by the Foundation (...), we are dealing with "managerial positions", a concept that, for the purposes of transparency legislation, must be understood substantially equivalent to that of "managerial staff", given articles 3.2 and 11.1.b) of the LTC.

Article 11.1.b) of the LTC, already cited, uses the concepts of "high-ranking public administration official" and "managerial staff of public bodies, companies, foundations and consortia" (of a public nature or that depend on the Administration) to determine the active advertising obligations of the remuneration in the public sector.

But, beyond this name, this circumstance also seems to be deduced - at least with regard to the positions of director of "People Management" and director of "University Services and Projects (SIPU)" - from the detailed information in the institutional organizational chart of the Foundation (...), also published in the transparency office, on the specific functions entrusted to these people.

Given this, and even if their consideration as "managerial staff" could be debatable, given that in any case we would be facing a request referring to people who would occupy positions of trust or special responsibility within the Foundation (...), for the information available, it would also be necessary to recognize the right of the works committee to access the requested remuneration information.

It is a criterion supported by this Authority (among others, the report IAI 3/2019, IAI 33/2019 or IAI 44/2019) that the transparency obligations provided for in article 11.1.b) of the LTC can be make extensive requests for access to information that affects both the management staff and the staff who occupy positions of special trust, of special responsibility within the organization or at a high level in the hierarchy of the 'entity, of free appointment, or that involve a high level of remuneration.

Although the law does not expressly provide for the publication on the pay transparency portal of this type of employee, in the weighting of the rights that must be done with respect to requests for access to information, that is, in what we could call the public interest test that must determine whether the 'access to information contributes to a better knowledge of the criteria of organization and operation and of how public resources are allocated, it is considered that these are positions that, due to their uniqueness and also due to the level of remuneration they usually bring associated, the knowledge of their remuneration may be relevant to the control of the use of public resources, so the result would be the prevalence of the public interest in its disclosure.

In accordance with the above, for this type of managerial and trusted employees, in the cases of requests for access to information about their remuneration, it would be justified to provide individualized information, for any concept retributive and even identifying the affected people, giving them the deadline provided for in article 31 of the LTC so that they can make allegations.

conclusion

The right to data protection does not prevent the delivery to the works committee of information on the remuneration received, for all concepts, by the Director General of the Foundation and by the directors of the three University Schools of the Foundation, as well as by the directors of "People management", "University services and processes", and "Business and entrepreneurship" of the Foundation, to the extent that, according to the information available, these would hold the status of management personnel of the entity or, in any case, they would occupy positions of trust or special responsibility within the organization.

Barcelona, February 3, 2021

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