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Legal report issued at the request of the Commission for the Guarantee of the Right of Access to Information Public in relation to the claim against the refusal by a City Council of the request for a copy of various documentation of a file for the protection of urban planning legality, by the person making the complaint

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 in relation to the refusal by a City Council of the request for a copy of various documentation of a planning legality protection file, by the reporting person.

Having analyzed the request, which is accompanied by a copy of the file of the claim submitted, in accordance with the report of the Legal Counsel, the following is reported:

Background

1. On October 1, 2020, an instance is presented to a City Council in which it is stated that, as a complainant in a file for the protection of planning legality in relation to works carried out without a municipal license, after notification of the resolution of initiation by the City Council on November 27, 2019, this has not yet been executed, nor has it received any response from the corporation to the instances in which it requested compliance.

Consequently, "[...] in the face of the flagrant breach of urban legality, I request that a copy of all the documentation that works in this administrative file be sent to me, from November 27, 2019, the date on which the resolution was communicated to me".

2. On November 4, 2020, the applicant addresses a new instance to the City Council in which he explains that "Having passed 1 month since I presented my instance, and under the protection of the provisions of the articles 35 and 36 of Law 19/2014 of December 29, on transparency, access to public information and good governance, I request that the information I requested on 1/10/2020 be delivered to me."

3. On December 20, 2020, the applicant submits a claim to the GAIP in which he states that the City Council has not given him a response to his request, nor has it provided him with the claimed access, reiterating its claim with respect to all the documentation contained in the planning legality protection file, since November 27, 2019.

He alludes to the fact that "As a complainant, I am an interested person, but the City Council does not consider it appropriate to respond, nor to explain the reasons why it does not enforce its own resolution."

4. On December 28, 2020, the GAIP sent the claim to the City Council, requesting a report that sets out the factual background and substantiates its position in relation to the

claim, as well as the complete file and, where appropriate, specify the third parties affected by the claimed access.

5. On January 18, 2021, the City Council sends a letter in which it explains that any complaint it receives will be forwarded to the persons complained of and at the same time "[...] requests a report legal on the actions to be followed and, if it is on some urban planning issue as in this case, requests a technical report on the actual state of affairs and the actions to be taken from the party reported. [...] these actions are not always carried out in less than 30 days, which is why the complainant is not always given a timely response."

He also states that the denounced party "[...] has submitted a letter to this City Council, showing his discomfort with the constant and unfounded accusations of Mr. [...] and expressly prohibiting [...] providing full copies of the evidentiary documents presented by her."

On the other hand, it also states that "[...] he has been provided (to the person making the claim) a copy of all the technical and legal reports contained in the file, and of the requirements made to the party complained against, as will continue to do."

Given the above, it concludes that "[...] even though he filed the initial complaint, he cannot be considered interested in the file given that he is not included in any of the cases specified in article 4 of Law 39 /2015, of 1 October of the Common Administrative Procedure of Public Administrations.

The City Council cannot provide copies of all the documents contained in the file in application of articles 15 and 16 of Law 19/2013, of December 9, on transparency, access to public information and good governance.

That the documents presented by the denounced party are not considered public information because they are not included in any of those related to chapter II of Law 19/2013."

6. On January 25, 2021, the GAIP requests the City Council to transfer the documentation of the claim to the person reported in the reference urban planning file, in order to send the GAIP the information and the considerations that it deems appropriate or, that it communicates the full name, ID, telephone number and address so that the GAIP can transfer the claim to it and, where appropriate, can formulate the allegations it deems appropriate.

On the same date, the GAIP addresses a request for a report to this Authority, in accordance with the provisions of article 42.8 of Law 19/2014, of December 29, on transparency, access to public information and good governance.

Legal Foundations

In accordance with article 1 of Law 32/2010, of October 1, of the Catalan Data Protection Authority, the APDCAT is the independent body whose purpose is to guarantee, in the field of the competences of the Generalitat, the rights to the protection of personal data and access to the information linked to it.

Article 42.8 of Law 19/2014, of December 29, on transparency, access to public information and good governance, which regulates the claim against resolutions on access to public information, establishes that if the refusal has been based on the protection of personal data, the Commission must issue a report to the Catalan Data Protection Authority, which must be issued within fifteen days.

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

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

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

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

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

II

The data protection regulations, in accordance with what is established in articles 2.1 and 4.1) of the RGPD, apply 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, 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"*.

As can be seen from article 6.3 of the RGPD and expressly included in article 8 of the Organic Law 3/2018, of December 5, on protection of personal data and guarantee of digital rights (LOPDGDD), data processing can only be considered based on these bases legal provisions 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 (hereafter 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 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 case at hand, given the documentation to which it is intended to be accessed, relating to certain documentation contained in a file for the protection of urban legality, it can be concluded that this information must be considered public for the purposes of the article 2.b of the LTC and subject to the right of access (article 18 LTC) as it is documentation in the possession of the local entity as a result of their activity, or the exercise of their functions.

It must be noted, however, that this right of access is not absolute and can be denied or restricted for the reasons expressly established in the laws, as is the case with the limits of articles 23 and 24 of the LTC regarding personal data.

Prior to the analysis of the substantive issue, it is important to make a point regarding the claimant's statement, formulated in the instance addressed to the City Council on November 4, 2020, by which he alludes to the application of articles 35 and 36 of the LTC with reference to the estimation of the request for access through the route of administrative silence, considering that it has a month has passed since your request without the City Council having resolved it.

To this end, although the cited articles provide for the estimated meaning of administrative silence when the request for access to public information is not resolved and notified within the legally established term, it is also important to bear in mind that the article 35.2 of the LTC provides that *"The right of access cannot be acquired through administrative silence if any of the limits established by this or other laws to have access to public information are met."*

The information that the claimant seeks to access contains personal data, which is why this fact entails a legal limitation that must be analyzed in accordance with the provisions of articles 23 and 24 of the LTC. To the extent that these articles may lead to a denial of the intended access, the request for access to the documentation through administrative silence cannot be understood as respected.

IV

The protection of urban legality is regulated in articles 199 et seq. of Legislative Decree 1/2010, of August 3, which approves the Consolidated Text of the Urban Planning Law (hereafter TRLU), as well as in articles 110-129 of Decree 64/2014, of 13 May, which approves the Regulation on the protection of planning legality.

In accordance with article 199 TRLU *"1. All actions or omissions that allegedly entail a violation of the determinations contained in this Law, in urban planning or in municipal urban ordinances, subject to sanctions in accordance with the provisions of this Law and the regulations that implement it, must give place to the administrative actions necessary to clarify the facts and, subsequently, or directly, if no prior information is required, to the initiation of a file for the protection of urban planning legality.*

2. The power to protect urban planning legality is mandatory. The exercise of this power gives rise to the instruction and resolution of a procedure or of more than one that they have for subject, jointly or separately, to the adoption of the following measures:

- a) The restoration of the altered physical reality and the violated legal order.*
- b) The imposition of sanctions.*
- c) The determination of damages and losses caused."*

Having said the above, through this procedure the law implements the regulatory system that must guarantee that the acts of use of the sun and the building conform to the determinations contained in the TRLU, the urban planning and the municipal urban ordinances.

Emphasize that these are not procedures of a punitive nature. So, in agreement with reiterated jurisprudence, in the face of a violation of planning legality it is necessary to distinguish between the power to sanction if it is classified as a planning violation (as required by Article 25.1 EC), and

the administrative power to restore the broken legal system, through the adoption of the necessary measures for the re-establishment of the infringed urban order that do not have the nature or the nature of the sanction.

In this sense, under the title "Restoration of altered physical reality", article 206 of the TRLU provides for the different measures that the City Council must take depending on the situation irregular concrete produced.

"1. Once the period of two months established by article 205 has passed without the relevant enabling administrative title having been requested, without the required communication having been made or without the works or actions having been adjusted to content of these, the competent body, through the resolution of the restoration procedure, must agree to the demolition of the works, at the expense of the person concerned, and must definitively prevent the uses to which they could give rise. It must proceed in the same way if the works or actions are manifestly illegal or if the enabling administrative title is refused because the fact of granting it would be contrary to the prescriptions of the urban planning.

2. If, in the event referred to in paragraph 1, the person concerned does not carry out the agreed restoration measures within one month, the competent body can order their compulsory execution.

3. In the cases of subsidiary execution of the agreed restoration measures, the restoration order that is issued enables the execution of the works in question, and in no case is it required to apply for a planning permit. For this purpose, the authority that subsidiarily executes the order issued must prepare and approve the technical project that allows the material execution of the works at the expense of the person who is obliged to do so."

v

The complainant states that *"As a complainant, I am an interested person, but the City Council does not consider it appropriate to respond, nor to explain the reasons why it does not enforce its own resolution."*

If so, and to the extent that the procedure seems to be still being processed, the first additional provision of the LTC could come into play, according to which *"the access of the interested parties to the documents of the administrative procedures in process is governed as determined by the legislation on legal regime and administrative procedure."*

However, and in spite of the strengthened position granted by urban planning regulations to all citizens for the purposes of being able to exercise public action - a question to which we will refer later - it does not seem that, with the information available can recognize him as an interested person in accordance with article 4 of Law 39/2015, of October 1, on the Procedure Common Administrative of Public Administrations (LPAC), according to which:

"1. The following are considered interested in the administrative procedure:

- a) *Those who promote it as holders of individual or collective legitimate rights or interests.*
- b) *Those who, without having initiated the procedure, have rights that may be affected by the decision that is adopted therein.*
- c) *Those whose legitimate interests, individual or collective, may be affected by the resolution and who appear in the procedure until a definitive resolution has been reached."*

In accordance with the jurisprudence, the reporting person has a legitimate interest in order to be considered interested to the extent that the resolution of the administrative file can produce a positive effect in his legal sphere, or eliminate a burden or encumbrance . However, in accordance with article 62.5 of the LPAC, the presentation of a complaint does not confer, by itself, the status of an interested party in the procedure.

So, although a procedure for the protection of urban legality can be initiated ex officio through a complaint, this fact does not necessarily confer on the complainant the status of interested party, and it will be necessary to analyze the request for information from in accordance with the LTC.

VI

Given the information that is available and, in particular, the nature of the file on which access to certain documentation is requested, it follows that the personal data that may be affected would be those relating to the authorities or intervening public employees, or those in charge of the various actions executed, as well as that relating to the person responsible for the commission of the facts.

With regard to the information on the authorities and staff at the service of the City Council in charge of the various tasks and functions within the requested procedure, article 24.1 of the LTC provides for the following:

"1. Access to public information must be given if it is information directly related to the organization, operation or public activity of the Administration that contains merely identifying personal data unless, exceptionally, in the specific case it has to prevail over the protection of personal data or other constitutionally protected rights."

This precept includes the identification data (name, surname and position) of the employees or positions public responsible for the actions carried out in the different procedures, and therefore it is information that must be given to the claimant, unless there are exceptional cases in which it is necessary to preserve their privacy.

In the event that any of the actions carried out in the file had corresponded to a person by virtue of a contract for the provision of services, it is necessary to remember article 13.1 of the LTC, which provides for the obligation to publish actively, among others, *"d) The contracts signed, with the indication of the object, [...] the identity of the successful bidder, [...]. This information must be up-to-date and refer to at least the last five years"*. The obligation to publish covers all contracts, including minors, and regardless of whether the successful tenderer is a legal or natural person, and enables the public to know the identity of the successful tenderer,

among other aspects. Consequently, there should also be no inconvenience in giving the person claiming this information.

VII

With regard to the information on the person responsible for the commission of the illegal acts in the procedure for the restoration of urban legality, and given the non-sanctioning nature of this type of file (the City Council in its letter of 27 /01/19 acknowledges that no urban sanctioning proceedings will be initiated), a priori it does not appear that access could affect data considered to be particularly protected under the terms provided for in article 23 LTC, which provides for the following:

"Requests for access to public information must be denied if the information sought contains particularly protected personal data, such as those relating to ideology, trade union affiliation, religion, beliefs, 'racial origin, health and sexual life, and also those relating to the commission of criminal or administrative offenses that do not entail a public reprimand to the offender, unless the affected party expressly consents by means of a written which must accompany the application."

In any case, if any of the categories of data provided for in article 23 of the LTC can be known from the documentation to which access is sought, and in the absence of the express consent of the owner, access should be limited .

With regard to the other categories of personal data, it is necessary to comply with the provisions of article 24.2 of the LTC, from which:

2. If it is other information that contains personal data not included in article 23, access to the information can be given, with the previous reasoned weighting of the public interest in the disclosure and the rights of the people affected. 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. [...]."*

Therefore, with respect to the data not provided for in article 23 of the LTC, a weighting must be done between the public interest in the disclosure of the information and the right to data protection of the affected persons.

In matters of urban planning, the right of access to information is particularly relevant given the recognition of the public action formulated by article 12 of the TRLU, from which any citizen can demand before the administrative bodies and before the administrative contentious jurisdiction the compliance with the legislation and urban planning, an exercise that must be adjusted to what is established by the applicable legislation.

The power of protection of urban legality attributed to the City Council is perceptive exercise. In this sense, and for the purposes of transparency, any citizen must be recognized the right to access any information that allows him to check whether or not the infringed urban legality has been restored and to evaluate the management carried out by the current City Council of these powers.

At the outset, it should be borne in mind that although the right of access *"is not conditional on the concurrence of a personal interest, it is not subject to motivation and does not require the invocation of any rule"* (art. 18.2 LTC), for the purposes of being able to make an accurate weighting between the different rights and interests at stake, knowing the specific purpose for which you want to access the information is a relevant element. In fact, the particular interest that can be pursued by the applicant with the access is provided as a weighting criterion in article 15.3.b) LT by expressly establishing that it is necessary to take into consideration *"The justification by the applicants of his request in the exercise of a right (...)".*

In the case at hand, the claimant bases his request on the grounds that there would be a breach of the planning regulations given that, since the City Council notified him of the agreement to start the procedure for the protection of planning legality, on November 27, 2019, he is not aware that the person responsible has restored the altered physical reality in the terms provided for in the agreement. Given these foundations, it can be inferred that the objective of the claim is, in addition to knowing the information claimed, to assess and verify the management carried out by the City Council and, if it deems it so, to exercise the means at its disposal to in accordance with the urban planning regulations and the rest of the regulations.

To this end, it may be relevant to know the procedures carried out in an urban legality file in which the person claiming was the whistleblower, in order to verify the state of the same once the need to restore has been resolved physical reality altered in a certain sense.

Despite the above, the City Council, in the report dated January 18, 2021, states that *"[...] has already provided copies of all the technical and legal reports contained in the file, and of the requirements made to the reported party, as this will continue to be done"*. However, he considers that the documentation requested by the claimant covers *"documents and data provided by the other party, of which a copy cannot be provided"*, basing this on the application of data protection regulations.

On the other hand, the City Council also alludes to the fact that the person reported would have stated that he was against the fact that the documentation provided, for evidentiary purposes, was handed over to the person making the claim. In particular, the City Council states that it has presented a letter in which it showed *"its discomfort with Mr. [...]s constant and unfounded accusations, claiming that he is not even the adjoining owner of his property, and expressly forbidding the city council to provide full copies of the evidentiary documents presented by it."* However, the alleged circumstances (on the other hand inherent in any complaint regarding a planning violation that continues to be maintained over time) do not allow sufficient elements to be deduced to make their rights prevail over the interest of the person making the claim.

In order to balance the public interest in the disclosure of the information and the rights of the people affected, it is also necessary to analyze what personal data would be affected by the access request.

According to the information available, it follows that the personal data affected would be the identification data of the person responsible (name and surname, as well as probably the DNI and postal or electronic address for the purpose of notifications), as well as others that they may appear in the affected documents on the actions carried out with the aim of restoring reality, either by contribution from the interested party or by the City Council.

In this regard, it should be borne in mind that the fact that the elements that have been exposed may lead to the right of access prevailing, does not allow us to take into account the principle of data minimization contained in article 5.1 .c) of the RGPD, which requires that the data subjected to treatment are adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed.

With regard to the identification data of the reported person, and in accordance with article 111 of Decree 64/2014, the City Council, before starting a procedure for the protection of urban legality, must carry out preliminary actions to find out the circumstances of the case and determine the persons allegedly responsible, among others, having to communicate to the person reporting the facts the result of these actions.

According to the file sent by the GAIP, the result of the actions was communicated to the person making the claim on November 27, 2019 by the City Council, a document in which the name and surname of the person responsible is stated of the commission of the facts. Therefore, at the time of the access request, the claimant would already know his identity. However, it would not cover other identifying data (for example the ID number or the handwritten signature of the reported person), contact data (telephone, postal or email address etc.), or other personal data that could be included in the other documentation you have provided the reported person, to the extent that this other information is not relevant for the control of the municipal action.

It must be noted that the purpose of the access is to evaluate the management carried out by the City Council in this specific case or to carry out a control that allows it to check to what extent the infringed urban legality has been restored or not . Taking into account that the City Council states that it has made available to the complainant, and that it will continue to do so, the technical and legal reports contained in the file, as well as the requirements addressed to the complainant, and taking into account that these writings must be motivated, can be a sufficient means for the reporting person to have knowledge and be able to control the municipal action. But it should be borne in mind that to the extent that these documents must analyze and respond to the documents submitted by the person denounced in this file, there should also be no problem, from the point of view of the right to protection of data, by admitting access to these documents, previously removing, of course, the data that is unnecessary for the purposes of the control of the administration.

If what we are talking about is being able to control the municipal action, this can be done by accessing the documents (reports, resolutions, decrees, and any other type of writing) drawn up by the City Council or presented by the person denounced in the framework of this file, without the need to access data such as the ID number, contact details or other personal data derived from the documents submitted by the reported person that are not relevant.

conclusion

In the case at hand, it is appropriate to the regulations for the protection of personal data to give access to the entire file, as long as, by virtue of the application of the principle of data minimization, identifying data is omitted from access (ID number or signature of the person reported), contact details or other personal data derived from the documents submitted by the person reported that are not relevant for the purposes of monitoring the municipal action.

Barcelona, February 11, 2021

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