

IAI 8/2021

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 presented by a staff delegate against the City Council for the denial of access to the file to appoint the suitable person to perform the functions of Secretary of the Civil Registry.

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 by a staff delegate against the City Council for the denial of 'access to information on the data relating to the appointment file of the person suitable to perform the functions of Secretary of the Civil Registry.

After analyzing the request, which is accompanied by a copy of the administrative file processed before the GAIP, this Legal Counsel issues the following report:

Background

1. On July 19, 2020, the personnel delegate submits a request for access to public information before the City Council in which he requests that "se le de vista y copia del expediente por el cual se nombra a the ideal person to perform the functions of Secretary of the Civil Registry".
2. On December 21, 2020, the personnel delegate, faced with the lack of response to his request for access to the requested public information, filed a claim with the GAIP against the City Council.
3. On December 29, 2020, the GAIP sent the claim to the City Council, 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.
4. On February 16, 2021, the GAIP again reiterates the request for a report to the City Council in relation to the claim made by the person making the claim, as well as for the claim to be sent to third parties who are affected by the 'claimed access, specifically, to the person appointed for the functions of Secretary of the Civil Registry.
5. On February 17, 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.
6. As of today, this Authority is not aware that the City Council has responded to the request made by the GAIP.

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

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

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

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

II

Regulation (EU) 2016/679 of the European Parliament and of the Council, of April 27, relating to the protection of natural persons with regard to the processing of personal data (hereinafter, RGPD), defines personal data as "all information about an identified or identifiable natural person ("the interested party"); Any person whose identity can be determined, directly or indirectly, in particular by means of an identifier, such as a number, an identification number, location data, an online identifier or one or more elements of identity, shall be considered an identifiable physical person physical, physiological, genetic, psychological, economic, cultural or social of said person."(article 4.1 RGPD).

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, dissemination 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 legitimizing data processing based on the need for one of the legal bases to be met established in its article 6.1. 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".

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 Member States that applies to them in order to reconcile public access to official documents with the right to the protection of personal data under this Regulation.”

Law 19/2014, of December 29, on transparency, access to public information and good governance (hereafter, LTC), aims to regulate and guarantee the transparency of public activity.

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 person" (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 person making the claim requests "to see me and a copy of the file for which the suitable person is appointed to perform the duties of Secretary of the Civil Registry".

In the instance presented to the City Council, the applicant states: "That said square has been irregular since its naming since 2006 the (...) has more than 7,000 inhabitants according to the INE and currently has more than 8,400 inhabitants for which, the secretary must be designated by the Procedural and Administrative Management Body of the Administration of Justice, having to pay off the position immediately and request its coverage from the Ministry of Justice of the Generalitat, in charge of both economic and coverage.”

According to Decree 75/1997, of March 18, which regulates the procedure for the creation and modification of groups of secretaries of justices of the peace, the municipalities of (...) requested to be set up as Grouping of Secretaries of Courts of Peace.

Resolution JUI/124/2003, of January 27, approves the creation of the Group of Secretaries of Peace Courts number 46, made up of the secretaries of (...) and establishes, among other issues, that the personnel staff at the service of the Administration of Justice of this

grouping will be constituted by an officer acting as secretary and by an agent, that the headquarters of the Grouping of Secretaries of Peace Courts number 46 will be at the Peace Court of (...) and that the creation of the grouping will have effects and will come into operation from the moment they are budgeted and the places are covered.

Order JUS/92/2018, of 27 June, on the appointment of suitable persons for the secretaries of the justices of the peace of Catalonia regulates the procedure for the appointment of a suitable person to take charge of the secretariat of the justices of the peace of the municipalities of Catalonia with less than 7,000 inhabitants and, when they have exceeded this number, as long as civil servants are not appointed to the justice administration service according to the list of jobs that is approved, as well as the procedure for appointing the suitable person to be in charge of the civil registry of the respective justice of the peace, in the case of groups of secretaries of justice.

This Order provides that it is up to the competent body of each town hall to appoint them and establishes that the appointment of the suitable person must be carried out in accordance with the procedure provided for in the applicable local regulations.

In view of this, it must be understood that the object of the access request is the file of the procedure to appoint the suitable person to take charge of the civil registry of the justice of the peace of (...) This information must be understood as public for the purposes of article 2.b) of the LTC and subject to the right of access regime (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 regulation.

III

The claim is lodged against the lack of response to the request for access to the complete file by which a person is appointed to perform the functions of secretary of the Civil Registry at the City Council of (...), without more specific

In advance, it is necessary to warn of an element that must be taken into account in the case raised, and it is the fact that the person presenting the claim does so as a staff delegate. The written request for prior information presented to the City Council that appears in the file, is also presented as a staff delegate. Therefore, we will start from the premise that this person holds the status of delegate of the City Council staff.

This is a relevant question, given that they are the boards or staff delegates (art. 39 TRLEBEP (Royal Legislative Decree 5/2015, of October 30, which approves the revised text of the Basic Statute Law of the public employee)), as well as the Company Committee (art. 63 of the Workers' Statute (Royal Legislative Decree 5/2015, of October 30)), the specific bodies representing civil servants and workers public with employment contracts respectively, and as such, exercise the functions granted to them by the corresponding regulations (art. 40 TRLEBEP and 64 ET), among others, the function of monitoring compliance with current regulations.

The first additional Provision of Law 19/2014 provides that 2. Access to public information in matters that have established a special access regime is regulated by their specific regulations and, as a supplement, by this law.”

In this case, the workers' representatives have a specific right of access to information provided for in articles 40 of the TRLEBEP and 64 of the ET, and consequently it is these rules that must be applied as a matter of priority, without prejudice to the supplementary application of the access regime provided for in the transparency legislation.

Article 40 of the TRLEBEP, relating to the functions and legitimacy of the representative bodies, provides:

"1. Staff boards and staff delegates, where applicable, have the following functions, in their respective areas:

- a) Receive information on personnel policy, as well as data on the evolution of remuneration, probable evolution of employment in the corresponding field and performance improvement programs. (...) e) Monitor compliance with current regulations regarding working conditions, prevention of occupational risks, Social Security and employment, and exercise, if necessary, the appropriate legal actions before the competent bodies. (...)"

The TRLEBEP grants personnel delegates the function of receiving information on the evolution of personnel policies, (art. 40.1.a)), as well as that of monitoring and controlling compliance with the current rules in the field of employment (art. 40.1.e)). These, as workers' representative bodies, must be able to access the information available to the City Council that is necessary for the exercise of their functions, information that could contain workers' personal data.

With regard to labor personnel, article 64 of the ET attributes to the Works Council and by extension also to the staff delegates (art. 62.2 ET) the right to be informed "(...) on those issues that can affect the workers, as well as on the situation of the company and the evolution of employment in it, in the terms provided for in this article." Adding that information is understood as "the transmission of data by the employer to the works council, so that it is aware of a specific issue and can proceed to its examination." (art. 64.1 ET). Section 7 of this same precept also attributes to the representative bodies the function, among others, "1. To monitor compliance with the current rules in labor matters, Social Security and employment, as well as the rest of the agreements, conditions and usages of the company in force, formulating, as the case may be, the appropriate legal actions before the employer and the competent bodies or courts."

Both legal texts recognize the function of surveillance in compliance with current employment regulations to the representative bodies. The TRLEBEP also adds the right to receive information on personnel policies. Beyond this, there is no other specific provision that is directly related to the personnel selection processes for a

the provision of jobs, and consequently the eventual access to workers' personal information by their representative bodies should find their qualification in this function of monitoring the current rules.

Apart from the provisions of the specific access regime, it will also be necessary to take into account the provisions of the transparency legislation, the purpose of which is, as can be seen from article 1.2 LTC, to establish a system of relationship between people and the Public Administration and the other obliged subjects, based on the knowledge of public activity, the encouragement of citizen participation, the improvement of the quality of public information and administrative management and the guarantee of the retention of accounts and of resp

In this context, if citizens must be able to have this ability to control and hold public administrations to account, with more reason, if appropriate, this ability must be recognized in the representative of the workers.

IV

From here, with regard to the information contained in the file, in the absence of having the allegations that could have been formulated by the affected persons - who should have been transferred from the - request and/or claim in accordance with articles 31 and 42 LTC- and in the absence of knowing, with accuracy, the specific data contained in the file, it must be pointed out that at the outset to be excluded from access to specially protected data that may be included in the file, either because it was provided by one of the candidates (for example, disabilities, need to adapt certain tests, etc.) or either as result of any of the tests carried out (for example, psychotechnical tests that involve the evaluation of aspects of personality).

In this sense, article 23 of the LTC, relating to personal data deserving of special protection, provides that requests for access to public information must be denied if "the information sought to be obtained contains specially protected personal data, such as those relating to ideology, trade union membership, religion, beliefs, racial origin, health and sex life, as well as 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 to it by means of a written document that must accompany the request."

In similar terms, article 15.1 of Law 19/2013, of December 9, on transparency, access to public information and good governance, in its wording given by the eleventh final provision of Organic Law 3/2018, of December 5, on protection of personal data and guarantee of digital rights (LOPDGDD), provides that:

"1. If the requested information contains personal data that reveal the ideology, trade union affiliation, religion or beliefs, access can only be authorized if there is the express and written consent of the affected person, unless said affected person had made it manifestly public the data before access was requested.

If the information includes personal data that refers to racial origin, health or sex life, includes genetic or biometric data or contains data related to the commission of criminal or administrative offenses that did not lead to a public reprimand to the offender, access only it may be authorized if the express consent of the affected person is counted or if the latter is covered by a rule with the force of law.”

Thus, in general, if in the requested file there was or from its content information deserving of special protection could be deduced, its confidentiality must be preserved, unless with the request the express consent of the affected person had been provided or any other of the enabling circumstances provided for in article 15.1 of Law 19/2013, mentioned. If none of these circumstances occur, the right to data protection would prevail over the right to access information.

v

In relation to the rest of the personal data that may be contained in the aforementioned file that are not considered to be particularly protected data, it will be necessary to adhere to the provisions established in article 24 of the LTC, according to which:

"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.

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. (...).”

Thus, first of all, from the point of view of data protection, there would be no disadvantage in facilitating access (and copy) of the person claiming to that information or documentation of the file that does not contain personal data, such as, for example, the statements of exercises, the criteria for correcting and evaluating these exercises or other type of response template prepared as part of said process, as well as any other documentation or material that may have been as a reference for that purpose, or the criteria and scales set for the evalu

Secondly, there would also be no disadvantage, from the point of view of data protection, to provide certain merely identifying information of public employees who intervene by reason of their functions in the various procedures or public actions led to

term by the Administration, unless there are specific circumstances that justify the prevalence of the right to data protection of the person or persons affected.

In this sense, article 70.2 of Decree 8/2021, of February 9, on transparency and the right of access to public information (hereafter Decree 8/2021) specifies what is meant by merely identifying personal data and provides:

"For the purposes of what is provided for in article 24.1 of Law 19/2014, of December 29, personal data consisting of the name and surname, the position or position held, body and scale, the functions performed and the telephone and addresses, postal and electronic, of professional contact, referring to staff in the service of public administrations, senior positions and managerial staff in the public sector of public administrations.

In cases where the publication or access to an administrative document requires the identification of the author, the location data, the number of the national identity document or equivalent document must be removed in particular and the handwritten signature.

If the signature is electronic, the electronically signed document must be published in such a way that the properties of the electronic certificate used for the signature cannot be accessed.

The location data must be deleted in the event that it is not merely identifying data of the author in his position of position or staff in the service of public administrations."

On the other hand, and for the purposes of the weighting established by article 24.2 LTC with regard to the rest of the data, it must be especially taken into account that part of the information requested would already have been the subject of publicity by the City Council, in accordance with the regulations applicable to the process in question.

Thus, the revised text of the Law on the Basic Statute of the Public Employee (TRLEBEP), approved by Royal Legislative Decree 5/2015, of October 30, establishes that personnel selection processes in the field of Public Administrations are subject to a series of principles, among which those of publicity and transparency should be highlighted (article 55.2.a) ib)). Specifically, with regard to the provision of jobs for civil servants, the EBEP provides that they must be provided through procedures based, among others, on the principle of publicity (article 78 EBEP).

As far as labor personnel are concerned, article 83 TRLEBEP states that the provision of positions will be carried out in accordance with what is established in the collective agreements of application and, in its absence, by the system of provision of positions of the career civil servant.

At the local level, Decree 214/1990, of July 30, which approves the Regulation of personnel in the service of local entities, expressly provides for the publication in the BOP of the appointment of the selected persons (article 82 RPEL) .

Article 9.1.e) of the LTC, establishes that the results of the selective processes for the provision and promotion of personnel must be published (on the transparency portal or the corresponding electronic site) and it is not distinguished if it is a provisional provision or final

With regard to access to the status of staff of public administrations, article 21 of Decree 8/2021, establishes:

1. For the purposes of letter e) of article 9.1 of Law 19/2014, of 29 December, public administrations must publish the calls for tenders and the results of:
 - a) Access procedures to the bodies and scales of official, statutory and labor personnel.
 - b) Internal promotion procedures.
 - c) Provisional and definitive provision procedures.
 - d) Procedures for the selection of temporary staff or temporary workers, including temporary staff exchanges.
 - e) Scholarships and grants for providing services.
 - f) Intern recruitment offers.
2. The data to be published must refer, at least, to the announcement of the call, the bases, the official announcements and the name and surname and the four numbers of the national identity document or equivalent document of the persons admitted to each test or exercise of the process and of the person finally selected, in accordance with the criteria established in the field of data protection.
3. The update of the publication of the data is continuous, depending on the development of each call. In the event that there is no data to be published, this end must be stated."

Taking all this into account, facilitating access to the information that has been disseminated during the selection process does not entail a special interference with regard to the right to the protection of personal data of the persons affected, such as, for example, the lists of applicants admitted to the process, the appointment of the person who has passed the selection process or the workplace to which he remains assigned, and consequently, could be facilitated.

VI

With regard to the rest of the personal data that the claimed file may contain, it is necessary to analyze whether access to this data would be necessary to achieve the purpose of access pursued, which should be framed within the exercise of functions legally attributed to staff delegates, or at the very least, if it is justified to access them to achieve the transparency purposes provided for in Law 19/2014.

At this point it is appropriate to distinguish, on the one hand, access to the list of people who have participated, and on the other, access to the final result of the process and, therefore, to information on the selected suitable person.

With regard to the information related to all the people who have participated, the personnel delegate as a representative of the workers should be able to have the necessary information to monitor the evolution of the employment policy of the local body (arts. 40 EBEB and 64 ET).

In this sense, you should be able to have information about the calls made, their content, the advertising mechanisms used, the number of people who participated or other information about the calls.

However, the fact of having to have information related to these selective processes does not necessarily imply that access must be given to the identity of all the people who participated as applicants.

Knowing the contact details or certain identifying details (e.g. the full ID number) is not necessary from any point of view for the control of the administrative action. To the extent that we are dealing with people who have not been awarded the job, it is also not relevant to know the merits they have alleged, in order to check the administrative action.

On the other hand, from the perspective of the consequences that access may have for the people affected, giving access to the information that may be contained in it would provide information not only about the identification and contact data contained in the file, and to the content and result of any tests that have been carried out, of the participants, but also on the very fact of their participation in the process.

Knowing your participation in the process provides professional information that can have significant repercussions on your privacy. By way of example, it is important to bear in mind that applicants may have participated in the procedure with certain expectations of privacy, trusting in the confidentiality of this type of process, so that they could act with the certainty that neither, nor do colleagues have to know whether they have participated or not.

For this reason, in general, the control of the actions of the administration in these processes with regard to the people not selected should be able to be done by having the information available in an anonymized way. In this case, the claimant could be provided with information on how many people have applied for the advertised position, distinguishing for example between admitted and non-admitted candidates.

Taking into account the considerations set out, it does not seem that, in this case, knowledge of the identity of all applicants is justified. This disclosure would go against the expectations of privacy that each of the people participating in the aforementioned processes may have.

With regard to access to the data of the selected person, and leaving aside the specially protected data to which we have already referred, giving full access to their data contained in the file may entail providing information about their identification and contact details, experience, academic training or, where applicable, about the tests carried out. It will be necessary to make a prior weighting between the public interest in its disclosure and the impact it may have on the privacy of the candidate finally appointed.

In this case, to assess the public interest that may exist in access to information, it is necessary to take into account that article 31.6 of the revised text of the Basic Statute of the Public Employee (EBEP), approved by Royal Legislative Decree 5/2015, of October 30, recognizes the legitimacy of the most representative trade union organizations to challenge the agreements of the selection

"6. The most representative trade union organizations in the field of Public Service are authorized to file administrative and jurisdictional appeals against the decisions of the selection bodies"

Therefore, and to the extent that the delegate requesting the information belongs to a trade union organization that has the most representative status to carry out the control of the administrative action, it seems that the access will be able to cover not only the identity of the selected person, but also the knowledge of the alleged merits that have been taken into account (training, experience, tests taken, etc.) and the score obtained.

Certainly, this access entails a considerable impact on the right to data protection of the selected person, given that it allows to know not only the score obtained, but only other relevant aspects of their academic or professional life, and even elements of the his personality, depending on the tests carried out, which allow him to obtain a profile. However, this limitation seems to necessarily derive from the recognition of the legitimacy mentioned by the EBEP, given that it would not make sense to recognize the legitimacy to appeal administratively or through litigation, without being able to access the information necessary to analyze the viability of the resource

In any case, from the perspective of the principle of minimization (art. 5.1.c) RGPD), it will be necessary to exclude certain identifying and contact data of the selected person (no. ID, telephone, address, etc.), if they can be recorded.

In the event that it is not a delegate of a union organization that has the condition of being more representative, the information should be limited to the identity of the selected person and the scores obtained in the different merits or tests.

All this, without prejudice to the fact that certain personal circumstances of the selected candidate could justify the limitation of the claimant's right of access to the personal information referred to. In this sense, as has been said previously, it would be appropriate to transfer the access request, in order to, if necessary, be able to allege the concurrence of one of these circumstances (article 31 LTC).

conclusion

The data protection regulations do not prevent the access of a delegate of a trade union organization that has the condition of being more representative to information about identity data, training, professional experience, as well as the score regarding the merits and other evaluative elements that have been taken into account in the selection process and the score

In the case of not belonging to a union organization that has the status of more representative, the information must be limited to the identity of the selected person and the scores obtained in the different merits or tests.

On the other hand, access to certain identifying data (for example, full ID number) and contact information of the selected person is not justified, nor access to the personal data of the other applicants.

Barcelona, March 12, 2021

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