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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 for lack of response by a municipal company to the request for access to a copy of the minutes of the board of directors of December 9, 2020

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 submitted in relation to the lack of response by a municipal company, to the request for a copy of the minutes of the board of directors of December 9, 2020.

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 December 10, 2020, a request is presented to a City Council requesting "[...] The complete minutes of the Board of Directors of [...], held on December 9 of 2020, where the current management of [...] before the accounting irregularities of at least three company cards with inadequate fuel consumption expenses and representation expenses where they are supposed to have determined the disciplinary or legal (penal) measures to be taken to oblige to the return of unjustified expenses."

In particular, the request is accompanied by a link to a news item published in the local press in which it is reported that, according to its president, the board of directors has recently approved "[...] <exercise all those actions that are appropriate in law in order to reintegrate all the amounts that have been deducted from the company and exercise all those actions necessary to readjust where appropriate the professional categories that had been given without inspection>>".

This decision is taken, the news continues, in relation to the detection of related irregularities in the economic and accounting management of the entity between the years 2013 and 2019 and for which the previous manager of the entity and two workers, about whom, as indicated in the news, their identity has not been revealed.

2. On January 11, 2021, the applicant submits a claim to the GAIP in which he reproduces the request for a copy of the minutes of the entity's board of directors dated December 9, 2020 Attached to the claim are more news published in the media which echo the alleged irregularities detected by the board of directors and the decisions that have been taken.

In the same claim, the claimant also refers to another previously submitted request which is related to the same events. In that case, the request is aimed at obtaining a copy of the minutes of the board of directors dated December 2, 2020 and, among others, information relating to the bank movements of three credit cards.

3. On January 15, 2021, the GAIP will send the claim to the entity, requesting a report that sets out the factual background and grounds its position in relation to the claim, as well as the complete file and, if applicable, specifying the third parties affected by the claimed access.

4. On February 18, 2021, 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

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, 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 (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 circulation of such data and by which Directive 95/46/CE (General Data Protection Regulation, hereafter RGPD) is repealed.

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

For its part, article 86 of the RGPD provides that "the personal data of official documents in the possession of any public authority or public body or a private entity for the performance of a mission in the public interest may be communicated by said authority, organism or entity in accordance with the Law of the Union or of the Member States that applies to them in order to reconcile the public's access to official documents with the right to the protection of personal data under this Regulation".

The regulation and guarantee of public access to official documents held by public authorities or public bodies is regulated in our legal system in Law 19/2014, of December 29, on transparency, access to public information and good governance (henceforth, LTC), which recognizes people's right of access to public information, understood as such "the information prepared by the Administration and that which it has in its power as a result of its activity or the exercise of its functions, including that supplied by the other obliged subjects in accordance with the provisions of this law" (article 2.b) and 18 LTC). State Law 19/2013, of December 9, on transparency, access to information is pronounced in similar terms

public and good governance (hereinafter, LT), in its articles 12 (right of access to public information) and 13 (public information).

In the case we are dealing with in which access is requested to a copy of the minutes dated December 9, 2020 of the entity's board of directors, 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 of the LTC), as it is documentation in his possession as a result of his activity. 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.

III

The purpose of the claim is to obtain a copy of the minutes of the board of directors of the entity corresponding to December 9, 2020.

The request is related to the fact that, prior to the request, the statements of the current president of the board of directors regarding the detection of irregularities have been published in the media, especially in the local media which would affect the economic and accounting management of the entity between 2013 and 2019, for which the previous manager and two unidentified workers are responsible. On the other hand, it is also known that on December 9, 2020, the council would have agreed to transfer these facts to the legal advisors in order to study legal actions that are considered relevant for the defense of the interests of the entity. From all this it follows that the purpose of the access would be to know information related to these events that may be included in the aforementioned minutes.

However, it cannot be ruled out that the record object of complaint may contain other information not related to said irregularities.

Taking into account that it is a mercantile company, and with regard to the minimum content of the acts, it is necessary to comply with the provisions of article 97 of the Regulations of the Mercantile Registry, approved by Royal Decree 1784/1996, of July 19 . This article provides that the acts must contain at least the following information:

“[...]1.^a Date and place of the national or foreign territory where the meeting was held.

2.^a Date and manner in which the call had been made, [...].

3.^a Full text of the call [...].

4.^a [...] In the case of collegiate administrative bodies, the number of concurrent members will be expressed, indicating those who attend personally and those who are represented by another member.

5.^a A summary of the issues debated and of the interventions of which records have been requested.

6. The content of the agreements adopted.

7.^a [...] If it is collegiate administrative bodies, the number of members who voted in favor of the agreement will be indicated.

In both cases, and whenever requested by whoever voted against, the opposition to the adopted agreements will be recorded.

8.^a The approval of the act in accordance with article 99.”

In accordance with this provision, the minutes of the board of directors may include, at a minimum, data on identified persons (for example, the names of attendees, in their own name or on behalf of them, as well as the persons in which the agreements refer to) or identifiable (for example, from the summary of the matters or the interventions of the attendees).

In the case at hand, the fact that the media have covered the detected irregularities, the agreement to transfer the defense to the legal advisers, and in particular, the presumed responsibility for the facts attributable to the previous manager and two workers, based on several appearances or statements from the president of the board of directors.

This means that, although the content of the minutes to which access is sought may not directly identify the alleged perpetrators, given the circumstances in which the copy is requested, there can be no doubt about the identifiability of the previous manager

Reference must be made to Recital 26 of the RGPD by which "[...] to determine whether a natural person is identifiable, all means, such as singularization, that can reasonably be used by the person responsible for the treatment or any other person to identify directly or indirectly the natural person. To determine whether there is a reasonable probability that means will be used to identify a natural person, all objective factors must be taken into account, such as the costs and time required for identification, taking into account both the technology available at the time of the treatment like technological advances [...].

IV

Taking into consideration the circumstances in which the copy of the minutes is requested, that is to say, prior knowledge by the claimant of the irregularities detected by the board of directors in economic and accounting management and the agreement to transfer to legal advisors the defense of the interests of the entity, it is possible that there are categories of data with special protection in accordance with what is provided for in article 23 of the LTC.

Article 23 of the LTC provides that "Requests for access to public information must be denied if the information sought contains particularly protected personal data, such as those relating to ideology, the trade union affiliation, religion, beliefs, racial origin, health and sex 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 to it by means of a written document that must accompany the request."

This article excludes the possibility of accessing information related to "ideology, trade union affiliation, religion, beliefs, racial origin, health and sex life" as well as, especially in the context of the present claim, "[...] to the commission of criminal or administrative offenses that do not entail a public reprimand to the offender [...]", unless the sanction of the offender has been expressly consent of the affected person is obtained at the time of formulating the request.

At this point, it is necessary to bring to the analysis the provision of article 22.1 of the LTC by which "[...] the limits applied to the right of access to public information must be proportional to the object and for the purpose of protection. The application of these limits must take into account the circumstances of each specific case, especially the concurrence of an overriding public or private interest that justifies access to the information".

From the point of view of article 23 of the LTC, the request must be denied to the extent that it allows to know aspects or data with special protection and that would affect the private sphere of the previous manager or the other people to whom responsibilities are attributed, since although the detection of certain irregularities in economic and accounting management has been made public, the decision to transfer the defense to legal advisers indicates the suspicion that these facts could constitute criminal offences.

In the case at hand, although the information on the possible responsibilities of the previous manager has already been made public, it must be taken into account that it was not the same affected person who would have made it public. For this reason, the exception provided for in article 15 of the LT is not applicable in the event that the person concerned has made the information manifestly public. On the other hand, the information that has been made manifestly public may not cover the content of everything contained in the minutes in relation to these responsibilities.

The same would be applicable if, based on the information contained in the minutes, the claimant could learn the identity of the other affected workers.

In any case, the fact that the attribution of criminal responsibilities is not definitive but that only possible responsibilities can be discussed at this time, would not prevent the application of the limit of Article 23 LTC, given that it is a unproven and pending investigation information, the disclosure of which could still have more harmful effects on the people affected.

In conclusion, the fact that the content of the minutes is likely to contain information about the alleged commission of criminal offences, would justify limiting access to the information. Therefore, the information given should be anonymized, that is, without it being possible to identify the people affected, or through a summary that allows you to explain what the action of the board of directors is without offering information that allows you to identify the affected people

And this without prejudice to the fact that in the event that there is indeed a conviction of the people affected, the disclosure of certain information related to the facts, especially in the case of people who hold positions of public importance, may be protected by the duty of transparency .

In the event that there is no information from which eventual criminal responsibilities may be derived, this article 23 would not prevent access.

IV

With regard to access to the rest of the information that can be collected in the record and that is not related to categories of data from those provided for in article 23 of the LTC, it will be necessary to analyze it from the perspective of article 24 of the LTC, which regulates the access regime in the following sense:

"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. [...]"

As previously highlighted, the minutes will contain, among others, data relating to those attending the board of directors session, in their own name or on behalf of them, or those resulting from the demonstrations and interventions.

It must be said that the identification data of the members of the board of directors are subject to the regime of active advertising provided for by article 9.1.b) of the LTC, which provides in relation to transparency in the institutional organization and the 'administrative structure that the Administration must make public, among others, its organizational structure including the identification of those responsible for its bodies of the municipal societies dependent on the local bodies (art. 2.f) in relation to the art. 3.1.b)).

In accordance with what is provided for in articles 9 of the company's Statutes, the board of directors is the management and administration body of the company and, therefore, would remain included in article 9.1.b) of the LTC. Therefore, there would be no problem that access to the identity of the people attending could be given.

Now, with respect to the other contents of the minutes included in the summary of the matters that have been debated, interventions which have been requested to be recorded, the content of the agreements adopted and, if it were the case, the opposition of "some assistant to the agreements adopted, it will be necessary to make the weighting required by article 24 LTC between the public interest in disclosure and the right to data protection of the persons affected in view of the specific content of the agreement let it be dealt

Article 18.2 of the LTC provides that the exercise of the right of access is not conditioned on the concurrence of a personal interest, is not subject to motivation nor does it require the invocation of any rule. However, for the purposes of the weighting of article 24 of the LTC, knowing the motivation for which the claimant wishes to access the information may be a relevant element.

As previously highlighted, it follows that the claimant wants to know what disciplinary or legal (penal) measures would have been adopted with respect to the detected irregularities contained in the minutes of the board of directors of 9 December 2020.

In order to achieve this purpose, it does not seem justified to access other points of the minutes (if any) and whose content is unknown at the time of making this report, given that they would be irrelevant for the intended purpose and that it cannot be ruled out that it has relevant implications regarding the protection of personal data. Therefore, and in view of the concreteness of the interest expressed by the applicant, with the information available access to other information that may be included in the minutes and that contains personal data would not be justified.

conclusion

In view of the regulations for the protection of personal data, it would not be justified to hand over the information relating to any responsibilities that may have been incurred by people in the service of the entity in relation to the irregularities detected in the economic and accounting management of the entity between the years 2013 and 2019, otherwise the information would have to be anonymised. With regard to other agreements that may appear in the minutes, in view of the purpose alleged by the person making the claim, their relevance is not justified, so access will not be granted.

Barcelona, March 4, 2021