

IAI 11/2021

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 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 2, 2020 and information related to three company cards

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 access to a copy of the minutes of the board of directors of December 2, 2020 and information relating to three company cards.

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 6, 2020, an application was submitted to a City Council requesting:

- “[...] 1º The full minutes of the Board of Directors of [...], held on December 2, 2020, where the current management of [...] reports the accounting irregularities of at least three company cards with expenses inadequate fuel consumption and representation expenses and the disciplinary or legal (penal) measures to be taken to force the return of unjustified expenses.
- [...] 2nd Copy of all bank statements and receipts or invoices charged to these cards from January 2003 to November 2020, both inclusive of the 3 Company cards described in the announcement of December 2, 2020 by the address of [...] in which a possible fraud and embezzlement of public money has been detected, currently and provisionally of at least €100,000;
- [...] 3º The holder of any of these cards with irregular expenses, has been [...], YES or NO?;
- [...] 4º Holders of these cards and the number of people who have charged irregular expenses on these company cards and which positions they perform or have performed in [...];
- [...] 5º Are there people not linked to work [...] as users of these cards? YES or NO?;
- [...] 6º The Identification of the officials or politicians or public officials who have allegedly embezzled public money charged to these cards, to report them personally in court.”

The applicant justifies his request in which the press has recently covered the detection of irregularities affecting the economic and accounting management of the entity, made public by the board of directors, and on which as he states, he would have previously tried to investigate there.

He states that he wants the entity "[...] before the reality of the grave facts uncovered to collaborate with the clarification of these and provide PUBLIC information [...] related to these criminal facts and that we are all ready to know how they have I administer this public company [...]".

Attach to the request two news items published in the local press and related to these facts.

2. On January 11, 2021, the applicant submits to the GAIP a claim in which he reproduces the application in full, and attaches more news published in the media that echo the alleged irregularities detected by the council of administration and the decisions that have been taken.

In the same claim, the claimant also refers to another application submitted and 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 9, 2020.

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 affected persons, understood

as any information about an identified or identifiable natural person, directly or indirectly, in particular by means of an identifier, such as a name, an identification number, location data, an online identifier or one or more identity elements physical, physiological, genetic, psychic, 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 data personal data and the free movement of this data and which repeals Directive 95/46/EC (General Data Protection Regulation, hereinafter 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 Organic Law 3/2018, of December 5, on the protection of personal data and guarantee of digital rights (LOPDGDD), the processing of data can only be considered based on these legal bases of article 6.1. c) and e) of the RGPD when so established by a rule with the rank of law.

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

The regulation and guarantee of public access to official documents held by public authorities or public bodies is regulated in our legal system in Law 19/2014, of December 29, on transparency, access to public information and good governance (henceforth, LTC), which recognizes people's right of access to public information, understood as such "the information prepared by the Administration and that which it has in its power as a result of its activity or the exercise of its functions, including that supplied by the other obliged subjects in accordance with the provisions of this law" (article 2.b) and 18 LTC). State Law 19/2013, of December 9, on transparency, access to public information and good governance (hereafter, LT), is pronounced in similar terms, in its articles 12 (right of access to public information) and 13 (public information).

In the case we are dealing with in which access is requested to a copy of the minutes of the entity's board of directors dated December 2, 2020, as well as other information related to three company cards involved in the detected irregularities, this information must be considered public for the purposes of article 2.b) of the LTC and subject to the right of access (article 18 of the LTC), as it is documentation in their possession as a result of their 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

As can be seen from the file, the claim aims to obtain a copy of the minutes of the board of directors dated December 2, 2020, a copy of the movements and payment orders of three cards of the company's credit, with respect to the period between January 2003 and November 2020, and the information relating to the ownership of these or persons authorized to use them.

The request is related to the fact that the statements of the current president of the board of directors regarding the detection of irregularities that would affect the economic and accounting management of the entity between 2013 and 2019, partially attributed to the use of three company cards, among others, and for which the previous manager and two unidentified workers are held responsible.

The minutes of the board of directors dated December 2, 2020, as stated by the claimant, would contain the information relating to the irregularities detected. However, it cannot be ruled out that it 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).

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 [...].

In the case at hand, taking into consideration that the media have covered the detected irregularities and, in particular, the presumed responsibility for the facts attributable to the previous manager and two workers, it is possible that consist of categories of data with special protection in accordance with the provisions of 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 affected party expressly consents to it by means of a written document that must accompany 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 provided should be anonymized, that is, without it being possible to identify the affected persons, or through a summary that allows the detected irregularities to be exposed without providing information that allows the affected persons to be identified.

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 Law. 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 with in the minutes.

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 to take into account.

As has been highlighted above, it follows that the claimant wants all the information relating to the detected irregularities to be public so that the public can find out how the entity has been administered.

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.

v

In relation to the request for access to information relating to the three company cards which, according to the file, would be related to the irregularities detected by the board of directors, the claimant intends to know for a besides the identification data of the holders and certain information of the people who would have made use of them, as well as obtaining a copy of the movements and of the receipts or invoices of the expenses charged to each of the cards between January 2003 and November 2020 , both included.

In particular, the claimant requests access to the following information regarding the ownership of the cards and the people who have been able to use them:

- "[...] The holder of any of these cards with irregular expenses has been [...], YES or NO?"; - [...] Holders of these cards and the number of people who have charged irregular expenses on these company cards and which charges they perform or have performed [...]; - [...] There are people not linked to work [...] as users of these cards YES or NO?
[...];
- [...] The identification of the officials or politicians or public officials who have allegedly embezzled public money charged to these cards, to report them personally in court", and

And on the other hand, in relation to the details of the use of the cards, a copy of "[...] todos los extractos bancarios y justificantes o facturas cargadas a estas tarjetas desde enero del 2003 hasta noviembre del 2020 both inclusive of the 3 Company cards described in the communique of December 2, 2020 [...]".

In general, the use of credit cards by personnel holding public positions is related to the so-called "payments to be justified". These payments can be made through cash or through credit cards, as seems to be the case in this case, and consists of the administration or the public entity in question making them available for attend to frequent or recurring payments of small amounts usually intended for current expenses in goods and services, or to attend to occasional needs that do not have continuity during the financial year and that cannot be satisfied through the normal payment process, with the provision of documentation justification prior to the corresponding authorizations, provisions, obligations and payment proposal, which govern the ordinary procedure for the execution of expenditure. This exceptional payment procedure is provided for in article 190, in relation to article 162, of the Royal Legislative Decree 2/2004 of March 5, which approves the revised text of the law regulating Local Finances (TRLHL).

It should be borne in mind that the card holders have funds linked to public accounts for the exercise of functions entrusted to them, and their use must be linked to the public purpose that justifies the expenditure. Consequently, these people must be high-ranking officials or officials who occupy positions of special trust and responsibility, which require public funds to be available for the exercise of their functions, through a special procedure for the execution of expenditure as is those of the payments to be justified.

In a general context, it seems clear that knowing which people are the holders or have been attributed the possibility of using credit cards with regard to these payments to be justified is public information which may be of special public interest and which, a priori, it does not seem that it should have particular relevance in terms of the right to the protection of personal data, nor to personal privacy.

A different level of interference with personal privacy would involve knowing what the use of credit cards is through access to a copy of bank statements and payment orders that affect the expenses reflected in them (proofs or invoices), as the information that may be affected could be very diverse.

On the one hand, and with respect to the people who hold the cards or are authorized to use them, knowing all the bank transactions would probably allow us to know data relating to travel, restaurants, hotels, etc. Although this data, by itself, would not identify the holder or the authorized person, to the extent that the analysis of the movements can be related without disproportionate efforts to a natural person, it would allow obtaining information which in some cases could affect seriously in your intimate and personal sphere, especially if you also have a copy of the receipts or invoices relating to the expenses that are reflected in the bank statements where the detail of the expense is expressed.

Thus, by way of example, the fact of having information about the expenses that a person makes in restaurants, makes it possible to know not only the cost of the meal, but also the place where he eats and even what he eats (according to invoice detail). This information considered in isolation can already

itself information, for example, about certain aspects that are part of intimacy or about following a certain diet linked to a health problem or even religious convictions. But in addition, this information, which considered in isolation can have a significant enough significance, can end up describing a pattern of behavior, in which case it allows us to know a habit, for example if the person in question is a regular at a certain establishment, d 'a certain means of transport etc., which could affect in a highly intrusive way your right to the protection of personal data, affect particularly protected data or even your personal and family privacy, being able to reach, in some cases, up to and all to affect your personal safety.

On the other hand, the intended access could also affect other people other than the person authorized to use the credit cards to the extent that there may be information that allows them to be identified in the description of the concept of the expense or through of any other field included in the general information of the card movement.

In this regard, it should be remembered that article 31 of the LTC establishes that if the request for public information may affect the rights or interests of third parties, identified or easily identifiable, they must be given the transfer of the request , so that they can make the allegations they consider appropriate, in those cases where they can be decisive for the meaning of the re

In the case at hand, it is particularly relevant that the access request seeks to obtain information and a copy of documentation related to the detection of irregularities affecting the management and administration of the entity, which they relate to the commission of criminal offences. In this sense, article 23 of the LTC provides for the denial when the information is related, among others, to the commission of criminal offenses that do not entail a public warning of the offender, unless the affected expressly consent in writing.

According to what has been made clear, the fact that the attribution of criminal responsibilities is not definitive but that only eventual responsibilities can be discussed at this time, would not prevent the application of the limit of article 23 LTC, given that this is unproven information pending investigation, the disclosure of which could still have more harmful effects on the affected individuals.

In short, the communication relating to the identity of the holders or persons authorized to use the credit cards on which irregular use has been detected and which affect the financial and accounting management of the entity would involve giving to know information related to the commission of criminal offenses that would seriously affect the privacy of the people investigated, whether or not they are ultimately found responsible.

In the same way, it would also affect the privacy of those affected if, instead of providing the identity, the specific positions held or held by the people who have used these credit cards were provided to the extent that, in a priori, it seems that they will be high officials or officials who occupy positions of special trust and responsibility, easily identifiable.

In relation to the bank statements and payment orders (receipts and invoices) of the expenses charged to said credit cards, to the extent that it was possible to determine the identity of the holder or of those who have used the cards, it would also entail communicate data

related to the alleged commission of criminal offences, since part of the alleged irregularities would have been detected by the board of directors through the analysis of the expenses charged on them. In any case, it must also be borne in mind that the access request aims to access this information with respect to the period between January 2003 and November 2020, both inclusive, a fact that without going into detail already evidence that it would entail the access to a large amount of data which may be disproportionate to the intended purpose.

In conclusion, in application of article 23 of the LTC, it is not in accordance with the regulations to grant access to the identity of the holders or the persons authorized to use the credit cards subject to investigation for the detection of irregularities that affect the economic and accounting management of the entity, or the positions they hold or have held, nor communicate the content of bank statements and payment orders (proofs or invoices) to the extent that the identification of the people related to said irregularities.

On the other hand, information could be communicated in an aggregated manner, that is, limited to information that does not allow the credit card holders or users to be identified, on whether there have been expenses that are considered irregular, the number of people suspected of having made allegedly irregular use of credit cards and if any of them is not linked to work with the company, the categorization of the expenses that have given rise to the commission's suspicions of irregularities (restaurants, transport, stays ...), without providing the details, as well as the actions taken by the company to demand responsibility, of course, without identifying the people affected.

conclusion

In view of the regulations for the protection of personal data, it would not be justified to hand over the information to which it is intended to be accessed to the extent that it may be highly invasive of the privacy of the persons affected and that it may contain information relating to eventual responsibilities which may have been committed by people working for 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.

However, it would indeed be possible to provide aggregated information, so that it does not allow identifying the people affected, on whether there have been expenses that are considered irregular, the number of people suspected of having made allegedly irregular use of credit cards and if any of them is not linked to work with the company, the categorization of the expenses that have given rise to the commission's suspicions of irregularities without providing details, as well as the actions taken by the company to demand responsibilities .

Barcelona, March 4, 2021