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Report issued at the request of the Commission for the Guarantee of the Right of Access to Public Information in relation to the claim against a city council for the denial of access to the file of the selection process for three temporary reinforcement agent positions for in the 2020 summer season

The Commission for Guaranteeing the Right of Access to Public Information (GAIP) asks the Authority Catalan Data Protection Authority (APDCAT) to issue a report on the claim submitted against a city council for the denial of access to the file of the selection process for three temporary reinforcement agent positions for the 2020 summer season.

Having analyzed the request, which is accompanied by a copy of the administrative file processed before the GAIP, in accordance with the report of the Legal Adviser, I report the following:

Background

1. On July 30, 2020, the CSIF delegates of civil servants and the union section of the CSIF of the local police of a town hall, presented to that council a letter in which they request: "view of the file of the selection process for the three temporary reinforcement agent positions for the 2020 summer season in accordance with article 40 of Royal Legislative Decree 5/2015, of October 30, by which s approves the revised text of the Law of the Basic Statute of the public employee (EBEP) and article 53.1.a), of Law 39/2015, of October 1, of the common administrative procedure of Public Administrations. "
2. On January 27, 2021, one of the staff delegates, faced with the lack of response to the request for access to public information, filed a claim with the GAIP against the city council.
3. On February 5, 2021, the GAIP requests the city council to issue a report on the claim submitted, identify the third parties affected by the access and send the completed file to which it refers.
4. On March 16, 2021, the city council issues a report in relation to the claim presented in which it states that:

"That the file is for the selection of 3 reinforcement Local Police officers during the 2020 summer season, with an urgent nature and to cover layoffs and retirements, at the same time as structural reinforcement in the face of the crisis sanitary

That the file is complete, the call was published on the electronic headquarters of the City Council, it contains the act of constitution of the court and evaluation, report-proposal of the secretary and decree of urgent appointments.

That it is appropriate to give a public view of the file, with the safeguarding of the personal data of the applicants presented."

5. On April 24, 2021, the GAIP addresses the 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 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

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).

The information that the claimant wants to access, consisting of the file of the selection process for three temporary reinforcement agent positions for the 2020 summer season, is public information that contains personal data.

In accordance with the definition of treatment in article 4.2 of the RGPD "consultation, use, communication by transmission, dissemination or any other form of enabling access, access or interconnection, limitation, deletion or destruction " of personal data, are data treatments subject to the principles and guarantees of the RGPD.

The RGPD provides that all processing of personal data must be lawful, loyal and transparent in relation to the interested party (Article 5.1.a) and, in this sense, establishes a system of legitimizing the processing of data which is based on the need for one of the legal bases established in its article 6.1 to apply. Specifically, sections c) and e) of article 6.1 of the RGPD provide respectively, 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", or if "it is necessary for the fulfillment of a mission carried out in the public interest or in the exercise of public powers conferred on the person responsible for the treatment".

As can be seen from article 6.3 of the RGPD and expressly included in article 8 Organic Law 3/2018, of December 5, on the protection of personal data and guarantee of digital rights (LOPDGDD), the processing of data it can only be considered based on the legal bases of article 6.1.c) and 6.1.e) of the RGPD when so established by a rule with the rank of law.

At the same time, 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, body or entity in accordance with the Law of the Union or of the Member States that

they are applied in order to reconcile public access to official documents with the right to the protection of personal data under this Regulation.”

Law 19/2014, of December 29, on transparency, access to public information and good governance (LTC hereinafter) aims, among others, to "regulate and guarantee people's right of access to public information and documentation" (art. 1.1.b).

Specifically, article 18 of the LTC establishes that "people have the right to access public information, referred to in article 2.b, individually or in the name and representation of any legal entity legally constituted" (section 1). The mentioned article 2.b) 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 the which are supplied by the other obliged subjects in accordance with the provisions of this law”.

The information that is the subject of the claim presented by the personnel representative is "public information" for the purposes of the LTC and remains subject to the access regime provided for in these regulations. This right, however, is not absolute and may be denied or restricted for the reasons expressly established in the laws.

Specifically, and with regard to the right to the protection of personal data, it is necessary to take into account the limitations and criteria provided for in the transparency legislation (articles 23 and 24 LTC), and the principles of the personal data protection regulations.

III

In the personnel selection files it is foreseeable that they will contain, among others, the applicants' requests for participation, the lists of applicants admitted and excluded from the selection process, any tests carried out, the documents that may have been presented by the participants, the acts of the corresponding qualifying tribunal in which the evaluations of the alleged merits, of the interview carried out, etc., the result of the process, the appointment proposal and the resolution or hiring agreement of the person or persons are collected finally selected candidates. In this sense, the report issued by the city council at the request of the GAIP states "That the file is complete, the call was published on the electronic headquarters of the City Council, there is a record of the establishment of the court and evaluation, report-proposal of secretariat and decree of appointments due to urgency”.

Therefore, we must start from the fact that there will be information related to the people participating in the process, in addition to the data of the public employees responsible for its processing and resolution.

With regard to the information on employees or public positions that may be included in the file, article 24.1 of Law 19/2014 provides that "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”.

In this case, the identification data (name and surname and position) of the employees or public officials who have intervened in the exercise of their functions in the selection procedure would be included, as well as those of the qualified official who could eventually be responsible for delivering copies of the documentation to the applicant.

Article 70.2 of Decree 8/2021, of February 9, on transparency and the right of access to public information, specifies that pursuant to the provisions of Article 24.1 of Law 19/2014, of 29 December, "merely identifying personal data are those consisting of the name and surname, the position or position held, body and scale, the functions performed and the telephone and postal and electronic addresses, of professional contact, referred to the staff at the service of public administrations, senior officials and managerial staff of the public sector of public administrations".

Regarding the personal information about the participants in the selection process deserving of special protection, and in accordance with article 23 of the LTC "Requests for access to public information must 'be refused if the information sought contains particularly protected personal data, such as those relating to ideology, trade union affiliation, religion, beliefs, racial origin, health and sex life, and also 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."

It cannot be ruled out that the file contains information and/or documentation related to the health of the applicants, either because it was provided by the participants in the process (for example to prove a disability), or as a result of one of the tests carried out (for example, if applicable, physical tests or tests involving an assessment of aspects of personality).

In any case, if the documents in the file include information deserving of special protection under the terms provided for in article 23 LTC, it will be necessary to preserve their confidentiality and limit access, unless with the sole request that the express consent of the affected persons had been provided, which is not recorded.

IV

Access to the rest of the personal data of the participants requires a prior weighting between the different rights and interests at stake pursuant to article 24.2 LTC:

"If it is other information that contains personal data not included in article 23 (specially protected data), access to the information can be given, with the previous reasoned weighting of the public interest in 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 can be seen from the request for information and the claim presented to the GAIP, the person claiming makes his request as a staff delegate of the City Council and states that he is relying on article 40 of the Royal Legislative Decree 5/2015, of October 30, approving the revised text of the Law on the Basic Statute of the Public Employee (TRLEBEP) and articles 52 and 53 of the staff agreement, to access the information requested.

This is a relevant question, given that the boards or staff delegates (art. 39 TRLEBEP), as well as the company committee (art. 63 of the Workers' Statute), are 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 art. 64 ET), among others, the function of monitoring compliance with current regulations. Thus, it cannot be ruled out that, for the exercise of these functions, it is necessary to be able to access certain personal information.

However, article 40.1 a) of the TRLEBEP establishes that the Personnel Boards (and the Personnel Delegates, as the case may be), will have, in their respective areas, among others, the function of receiving information, on the personnel policy, as well as on the data relating to the evolution of the remuneration, probable evolution of employment in the corresponding field and improvement programs of the performance. Therefore, the specific provision of this article 40 of the TRLEBEP does not contain a general authorization that allows personnel delegates to access all the information contained in the files of the personnel selection processes, as requested in the present claim.

In this sense, as the recent STS ruling of February 9, 2021 has highlighted, "the mere invocation, fasting of justification, of the trade union representation cannot serve as an excuse to access all types of documentation, if you do not want for this way to empty the content of the fundamental right to data protection, when the owner of the same ignores the use that is made of his data, losing his power of disposition, in cases where the concurrence of any of the legally established exceptions". (FD sixth)

v

All in all, the purpose of the Transparency Law is to establish a system of relations between people and the public administration and other obliged subjects, based on knowledge of public activity, the encouragement of citizen participation, the improvement of the quality of public information and administrative management and the guarantee of accountability and responsibility in public management (article 1.2 LTC). It is in this context that it is necessary to assess whether or not access to the personal information of the participants in the selection process by the claimant would be justified.

Personnel selection procedures are competitive procedures, based on the principles of equality, merit and ability, transparency and publicity.

In this sense, the TRLEBEP (applicable as established in article 2.1.c) to civil servants and, where applicable, to the labor personnel of Local Entities), establishes these principles in article 55, where provides that: "1. All citizens have the right to access public employment in accordance with the constitutional principles of equality, merit and capacity, and in accordance with the provisions of this Statute and the rest of the legal system."

Also Law 7/1985, of April 2, regulating the Basics of the Local Regime, provides in the article 91.2 that The selection of all personnel, whether civil or labor, must be carried out in accordance with the public employment offer, through a public call and through the system of competition, competition or free competition in those that are guaranteed, in any case, the bear constitutional principles of equality, merit and capacity, as well as that of publicity."

For its part, the Municipal and Local Regime Law of Catalonia, establishes in article 285 that "local corporations must publicly formulate their employment offers".

Decree 214/1990, of July 30, which approves the personnel regulations in the service of local entities, regulates, under the principle of publicity, the personnel selection procedure, and provides in article 94, what:

"-1 Interim staff and non-permanent temporary labor staff are selected through a public call and the competition system, except in cases of utmost urgency.

-2 For the purposes of paragraph 1, the local body can call a single annual competition, where the order of preference must be established to fill the vacancies that occur during the year.

-3 In the case of utmost urgency, the appointment of interim staff and the hiring of temporary labor staff must be published in the Official Bulletin of the province and the Official Journal of the Generalitat of Catalonia, and notice must be given in plenary in the first session it has.

-4 Interim staff must, in any case, meet the general qualification requirements and the other conditions required to participate in the access tests to the corresponding bodies or levels as career civil servants."

In this context, and for the purposes of transparency, the claimant should be able to have the necessary information that allows her to verify that the selection procedure she is requesting has been processed with full respect for the guiding principles of this type of procedure.

From the perspective of transparency legislation, specifically, the obligations of active advertising, article 9.1.e) of the LTC establishes that they must be published (on the transparency portal or the corresponding electronic site), " The notices and the results of the selective processes for the provision and promotion of staff", a forecast that does not distinguish whether it is provisional or definitive provision.

Also, it should be taken into account that Decree 8/2021, of February 9, on transparency and the right of access to public information, specifies in its article 21 which are the specific procedures that are affected by the 'obligation of active publicity regarding calls for proposals and the results of the selective processes for the provision and promotion of personnel, and what is the specific information that must be published. Thus, this article 21 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 proposals 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.

(...)."

It would not, therefore, pose any obstacle from the point of view of data protection, to facilitate access to the personnel representative to the data of the people who have passed the selection process, with the final score obtained and the place of work to which they remain assigned, as well as the identity of the people who may have been admitted to each test or exercise of the process.

In addition, it must be taken into account that the participants in the selection process knew, from the moment of the call, which personal information could be the subject of dissemination by application of the principle of publicity. In other words, the participants knew that both their participation in the process and the results obtained could be known as required by the principle of publicity.

Taking all this into account, facilitating access to the information that must be published during the selection process would not entail a special interference with regard to the right to the protection of personal data of the affected persons and, consequently, could be provided to the personnel representative.

Beyond this, participants may also have a certain expectation of privacy regarding the rest of the personal information that affects their participation in the selection process, such as the application for participation, the documentation proving the merits, etc. legacies (curriculum vitae, academic training, professional experience, courses, etc.) and, if applicable, the content of the tests carried out. And for the least, they can have this expectation in the sense that this information - which goes beyond what the principle of publicity would require to be made public - must not be known by any person outside the selective process who requests it.

Given that in the present case the request is made by a staff representative, it is necessary to analyze whether access to this information would be necessary to achieve the purpose pursued, which should be framed within the exercise of legally attributed functions to the staff delegates, or at least if it would work justified to access it to achieve the purposes of transparency provided for in the LTC.

Although the exercise of the right of access is not subject to motivation (article 18.2 LTC), knowing the motivation for which the person claiming wants to access the information or, in this specific case, a minimum explanation of the need or relevance of the data requested for the exercise of her functions as a trade union representative may be a relevant element to take into account for these purposes.

In this sense, it can be said that the personnel representative, as the representative of the workers, should be able to have the necessary information to monitor the evolution of the local body's employment policy (articles 40 TRLEBEP and 64 ET). Thus, 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 the selective processes carried out by the City Council does not necessarily imply that access must be given to the set of information of all the people who participated as applicants, so that they are identifiable.

Giving access to the aforementioned information would facilitate the development of profiles and this, in the workplace, is a measure that can be quite invasive of the privacy of the people affected, which can affect both the unfolding of their lives in the personal sphere, as in the social or professional sphere.

For this reason, it is convenient to distinguish access to this type of information for non-selected participants from access to this same information for those finally selected.

Given that the request for information from the personnel representative must be understood as made in the context i for purposes of control over the actions carried out by the City Council in the selection process, which is necessarily governed by the principles of merit, capacity, equality, publicity and transparency, to which we have referred, the incidence that may have knowing this information relating to candidates who have not been selected for the control of administrative action by the workers' representatives is much less. These people, despite opting for the places called for, have not been finally selected, so they have not been favored at any time with the decision taken by the acting administration.

The claimant does not adduce any other reason apart from her status as a staff representative to justify access to the information. Therefore, there are no sufficient reasons to justify the prevalence of the right of access claimed by the personnel delegate over the right to data protection of the affected persons (unselected candidates).

On the other hand, the possibility of providing anonymized data must be ruled out. In a case like this, the removal of the personal identifying data of the affected persons from said information or documentation would not be an effective tool to guarantee its anonymization, given that the information could easily be linked to a specific identifiable person given the publication of the resolution of the selection process.

Therefore, from the perspective of the data protection regulations, it would not be justified to obtain access and a copy of said documentation (application, accreditation of the alleged merits, or other documentation that may be included in the file in this regard) relating to non-selected candidates.

With regard to the people finally selected, it could be considered whether access to said information could be justified in view of what is established in article 31.6 of TRLEBEP.

Article 31.6 of TRLEBEP provides that:

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

This precept recognizes the legitimacy of the most representative trade union organizations to challenge the agreements of the selection bodies. And, as a result, this legitimization allows you to presuppose your qualification to analyze the file before making the challenge.

So, if the person requesting the information is part of a trade union organization that has the status of more representative, in order to carry out the control of the administrative action, it seems that access could 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, etc.) and the score obtained, as well as the content of the tests and/or exams taken.

Certainly, this access would lead to 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 other relevant aspects of their academic or professional life, and even elements of their personality, depending on the tests carried out, which make it possible to obtain a profile. However, this limitation seems to necessarily derive from the recognition of the legitimacy mentioned by the TRLEBEP, 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 appeal .

This, without prejudice to excluding certain identification and contact data of the selected person that may be included and that, from the perspective of the principle of minimization (article 5.1.c) RGPD), would be unnecessary (ID number, telephone, address, signature, etc.).

In the event that it is not a representative of the workers 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

In the particular case of local police personnel, it is necessary to take into account the sectoral regulations applicable to the security forces, which provide that they are identified with a professional identity card (TIP) in place of their first and last names, for security reasons. Law 4/2003, of April 7, on the organization of the public security system of Catalonia, provides in article 25 ter that "All members of local police forces must carry a professional accreditation document. " (...) "This document must include, at least, the municipality of affiliation, the identification of the professional category and the individual registration number. (...)."

To the extent that this is the identification mechanism provided for by the regulations for security reasons in relation to police force officers, it should be the form of identification of those affected chosen to communicate the information, as long as the persons to whom refers to whether they are still active in the police force at the time of facilitating access to the information.

Conclusions

The data protection regulations would not prevent the personnel representative from accessing the merely identifying data of the public employees who have participated in the selective process referred to in the claim, to the personal information of the participants that must be the subject of

publication in accordance with the regulations in force and, even, in the case that it was the trade union representative of a trade union organization that is considered the most representative, in the documentation certifying the alleged merits of the persons finally selected

Barcelona April 14, 2021

Machine Translated