

IAI 19/2021

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 call for two corporal positions

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 town council for the denial of access to the file for the call for two corporal positions.

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 Counsel, I inform you of the following:

Background

1. On July 30, 2020, the CSIF delegates of the official staff and the union section of the CSIF of the local police of a town hall, presented to that council a letter in which, in relation to file of the call for two corporal positions, they question him about the reasons why this call has not been published in the BOE and about the reasons for not providing the urban guard inspector position and, in the which they finally request:

"view of the file of the process of the call for two corporal positions in accordance with article 40 of the Royal Legislative Decree 5/2015, of October 30, which 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, on 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, files a claim with the GAIP against a city council, in which she requests access to the file of the call for the selection process for two corporal positions.

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:

"This file corresponds to the selection process for two supply corporal positions by internal promotion, currently suspended in its processing, given the structural difficulties that the City Council is facing in the reorganization of the Police force

Local, prioritizing the appointment of an accidental Chief of Police and the start of a selection process to fill the places currently filled with interims.

(...)

It corresponds to the public hearing of the file."

At the date of issue of this report, this Authority has no evidence that the City Council has solved the request for information submitted by the staff delegates and facilitated the examination of the file.

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 to which the claimant wants to access, consisting of the file of the selection process for the provision for internal promotion, of two corporal positions processed by the claimed council, is public information that contains, a priori, 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”.

According to the City Council of Caldes d'Estrac in the report drawn up at the request of the GAIP, the personnel selection procedure subject to the consultation is "currently suspended in its processing (...) prioritizing the appointment of an accidental Chief of Police and the beginning of a selection process to fill the places currently filled with temporary workers". This indeterminacy about the status of the file and the period that has elapsed since the publication of the call - as stated in the report, it was published in the BOE of August 1, 2020 (it was possible to check this publication in the BOE (<https://boe.es>) and at the BOP (<https://bop.diba.cat>))- leads us to consider that there has been a withdrawal of the procedure by the convening administration and therefore that it is a finalized file.

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

With regard to the personal data that may be contained in the claimed file, it must be taken into consideration that the file is not available and that, as stated by the Caldes d'Estrac City Council in the report drawn up at the request of the GAIP, the procedure would have been suspended during its processing and that at the moment the city council would be "prioritizing the appointment of an accidental Chief of Police and the start of a selection process to fill the places currently filled with interims". It is not indicated, however, which procedures had been carried out at the time of the suspension and, therefore, whether or not the applications for participation had been submitted and whether any of the tests provided for in the call had been taken.

It must be taken into account that at the time the request for access to information is submitted (July 30, 2020) the call for proposals had not yet been published (the

call for the selection process was published in the BOE of August 1, 2020) and, therefore, at the time of the application, the file would not contain any other personal data than that of public employees and charges in charge of its processing. However, if we take into consideration the time when the claim is presented and access to the file is requested (January 27, 2021), other procedures for the call could have been carried out that would have entailed the treatment of other personal data.

In the files relating to the selection process, it can be foreseen that they contain, among others, the applicants' requests for participation, the lists of admitted and excluded applicants, the documents that the participants may have presented, the minutes of the court qualifier in which the evaluations of the alleged merits, the tests carried out, the result of the process, the appointment proposal and the resolution or hiring agreement of the person or candidates finally selected are collected. In the case at hand, it is unknown at what point the suspension would have occurred and therefore which of these procedures and the corresponding information of their holders is included in that file, although it can be ruled out at the outset, for reasons obvious, the relative to the result of the process.

If the suspension occurred after the application submission process, it can be foreseen that, in addition to the data of the public employees responsible for its processing and resolution, there will also be information related to the applicants, which according to the second basis of the call, it must be a "career official in the category of agent of the Local Police of Caldes d'Estrac City Council".

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 infractions

criminal or administrative measures 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, physical or psychotechnical tests that involve an assessment of aspects of the personality as well as the medical examination provided for in the basis of the call).

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 with the selection of public employment, through the official and through the system of cooperation with 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 staff regulations for the service of local entities, regulates, under the principle of publicity, the selection procedure for staff, both civil and labor, of local entities (leaving to its own regulation the access to the status of national licensing official).

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 had, if this were the case, passed the selective process, with the score final result obtained and the workplace to which they remain attached, as well as the identity of the people who, eventually, have been admitted in 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/or the personal interview. An 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, it 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 and more so in a case like the one we are in where the procedure did not end with the resolution of the call and the appointment of the selected people.

The claimant states in her letter of request that they have observed errors in the processing of the procedure and that the access is to verify that it is carried out correctly. However, as has been explained, from the information provided by the city council it is not clear the status of the file, if it is suspended pending reports or for another reason and it is planned to resume its processing or if the city council has given up the procedure, in any case, for the realization of the stated purpose it would be sufficient to have the information that has already been made public and it would not be necessary to sacrifice the privacy of the people who have participated in the selection process.

On the other hand, the possibility of providing anonymized data must be ruled out. In a case like this, in which it is an internal promotion procedure and in which the applicant is part of the city council itself, the elimination of the personal identifying data of the persons affected by said information or documentation would not be an effective tool to guarantee it

anonymization, given that the information could easily be linked to a specific identifiable person previously known by the claimant.

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 sense) relative to the candidates for the call and more when none of these have benefited from the administrative decision.

It must be taken into account that, as we have already argued in some other report (for example the IAI Report 18/2021) in general the provision of article 31.6 of the TRLEBEP which recognizes the most representative trade union organizations as legitimate to challenge the agreements of the selection bodies must also entail the recognition of their qualification to be able to access the file before making the challenge. This access may cover not only the identity of the selected person, but also the knowledge of the alleged merits that have been taken into account (education, experience, etc.) and the score obtained, as well as the content of the tests and / or of the exams carried out. However, in a case like the one we are dealing with, in which no person has yet been named or the procedure has been terminated, there would be no justification for accessing the personal data of the people who have submitted the application or that they have taken any of the tests.

Finally, with regard to the way to facilitate the information of the candidates, in the particular case of the integral staff of the local police it is necessary to take into account the sectoral regulations applicable to the security forces, which foresees that they are identified with a badge of professional identity (TIP) in place of the first and last name, 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 relating to these officers as it has established as well article 70.3 of Decree 8/2021, of February 9, on transparency and the right of access to public 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 selection process referred to in the claim, and the personal information of the participants that must be the subject of publication in accordance with current regulations.

Barcelona, April 14, 2021