

IAI 21/2021

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 against a City Council's lack of response to the request for access to a disciplinary file

The Commission for the Guarantee of the Right of Access to Public Information (GAIP) asks the Catalan Data Protection Authority (APDCAT) to issue a report on the claim presented in relation to the lack of response of a City Council to the request for access to a disciplinary file.

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 October 8, 2020, an application was submitted to a City Council that set out the following (names and surnames have been anonymized in this report):

"That I was aware that in the disciplinary file filed against Mr. By means of Mayoral Decree 400 of February 26, 2019, there are declarations by the head of the Urban Guard [...]. That in the disciplinary file filed against me with Mayoral Decree 401 of February 26, 2019, there are two reports drawn up by the head of the Urban Guard [...]. That in said reports I am accused of acting together with Mr. A, against his person and makes serious accusations in this regard. That within these two reports he introduces comments and private information from Mr. A, so it is not difficult to establish the relationship that in the file filed with Mr. There will be relevant information about me personally and of which, being interested, I must know in due course."

In this context, he requests the transfer of all actions in which the head of the Local Police has intervened in the file assigned to Mr. A.

2. On February 27, 2021, the applicant presents to the GAIP a claim in which he states that the City Council has not responded to his request, nor has he provided the information, and states that he requires access in the requested documentation "[...] for an issue of workplace harassment".

3. On March 2, 2020, the GAIP sent a communication to the claimant in which he is required to specify and specify the object of the claim, in particular what is the information to which he intends to access and which is not 'has delivered

On the same date, the claimant responds to the request of the GAIP and sets out the following:

"I am knowledgeable, since Mr. A, that within his disciplinary by Mayor's Decree 400/2019, there is information with photographs included of my private life, which the Inspector of the Urban Guard would have added [...].

I requested this information from the town hall but they did not answer me, and I need it to comply with the protection of my rights.

However Mr. A has not provided it to me for fear of infringing the data protection law."

4. On March 3, 2021, the GAIP will send the claim to the City Council, 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.

5. On March 24, 2021, the City Council sends the GAIP a report in which it states, in summary, that the disciplinary file initiated against Mr. A was resolved through Mayoral Decree no. 851, of June 4, 2020, which was appealed for reinstatement and the claim dismissed through Mayoral Decree no. 1201, of July 27, confirming the integrity of the resolution.

According to what the City Council states, *"[...] On October 26, 2020, it was received from the administrative court no. 7 of Barcelona office claiming administrative file and signaling hearing in the processing of the abbreviated procedure filed against Mayor's Decree no. 1201, of July 27, 2020".*

In this context, the City Council considers that the request of the applicant to access all the actions in which the Chief of the Local Police has intervened, in the framework of the disciplinary file initiated against Mr. A, must be denied under the provision of article 21.1.b) of Law 19/2014, of December 29, on transparency, access to public information and good government (LTC), by which, the right of access to public information may be denied or restricted if the knowledge or disclosure of the information entails a detriment to the investigation or sanction of criminal, administrative or disciplinary infractions. In particular, it alludes to what *"[...] mayoral Decree no. 851, which dismisses the appeal against Decree no. 851, of June 4, 2020, which resolves the disciplinary file of Mr. A, has been contested before the administrative contentious court no. 7 of Barcelona, so its enforceability is pending judicial resolution."*

Finally, it identifies Mr. To as a third party affected by the request.

6. On March 25, 2021, the GAIP requests a report from this Authority, in accordance with the provisions of article 42.8 of Law 19/2014, of December 29, on transparency, access to information public and good government.

Legal Foundations

I

In accordance with article 1 of Law 32/2010, of October 1, of the Catalan Authority of Data Protection, the APDCAT is the independent body that aims 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

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 the Organic Law 3/2018, of December 5, on protection of personal data and guarantee of digital rights (LOPDGDD), data processing can only be considered based on these bases legal provisions 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 acknowledges to people the 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 the 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 it is requested to know information contained in a disciplinary file, it must be considered public information for the purposes of article 2.b) of the LTC and subject to the right of access (article 18 of the LTC), being documentation held by the City Council as a result of their powers. However, the right of access to public information is not absolute and can be denied or restricted for the reasons expressly established in the laws, as is the case of the limits of articles 23 and 24 of the LTC regarding the personal data.

III

Prior to the analysis of the substantive issues, it is appropriate to make some considerations about the object of the claim, given that the scope of the access request is not clear.

Initially, as can be seen from the request for access addressed to the City Council, the claimant requested the transfer of all actions in which the chief inspector of the Local Police intervened in the file in Mr. A. Despite this, in the response to the request of the GAIP to specify the terms of his claim, he states that he was aware that in the disciplinary file of Mr. There is information with photographs included of his private life, incorporated by the chief inspector of the Local Police and that "I asked for this information from the town hall but they did not answer me, and I need it to comply with the protection of my rights".

In view of this it seems clear that he has a special interest in obtaining the information about his private life, including the photographs, which is recorded in the actions in which the Chief Inspector has intervened, but it does not seem that it can be understood that the claimant has reduced the initial object of his request - the transfer of all actions in which the Chief Inspector of the Local Police intervened in favor, solely, of actions where there is information that is his own.

This is relevant because in the event that the requested information affected exclusively the person making the claim, by application of article 24.3 of the LTC, the claim should not be resolved by the GAIP applying the regulations for access to public information, but should be processed in accordance with data protection regulations (art. 15 RGPD) and the claim should be resolved by the Catalan Data Protection Authority.

IV

The origin of the request for access goes back to the processing by the City Council of two disciplinary files that affect the claimant and another official for acts that would presumably constitute workplace harassment towards the inspector head of the Local Police. As can be seen from the access request, the claimant considers - or rather, senses that the file open to the other person may also contain information relating to his person.

He states this in his written response to the request for clarification of the object of the claim by the GAIP, in which he states that the other official has informed him that in the disciplinary file against him there there is documentation with the claimant's personal information.

Taking this into account, and in accordance with what appears in the file sent, it could be considered that the documentation to which the claimant intends to access may contain personal information referring to his person, as well as personal information of third parties, especially the official accused in the disciplinary file where the actions to which access is sought are opened, the data of the chief inspector of the Local Police as whistleblower, the authorities and the staff at the service of the City Council in charge of the different tasks and functions within the procedure, or other third parties - not identified in the file sent to the GAIP - whose data could appear in the documentation, such as their image in the photographs in the which the claimant alludes to in his claim.

However, the City Council would have stated in its report sent to the GAIP that the only third party affected is Mr. A, as an accused in the disciplinary file containing the documentation to which access is sought. In any case, there will also be information linked to the Chief Inspector, since what is requested is precisely information about actions in which the Chief Inspector has intervened.

With respect to the claimant's access to information that refers to him/her, article 15 of the RGPD must be kept in mind, according to which:

"1. The interested party will have the right to obtain confirmation from the person in charge of the treatment of whether or not personal data concerning you are being processed and, in such case, right of access to personal data and the following information:

- a) the purposes of the treatment;
- b) the categories of personal data in question;
- c) the recipients or the categories of recipients to whom they will or will be communicated personal data, in particular recipients in third parties u international organizations;
- d) if possible, the planned retention period for personal data or, if not possible, the criteria used to determine this term;
- e) the existence of the right to request from the person responsible the rectification or suppression of personal data or the limitation of the processing of personal data related to interested, or to oppose said treatment;
- f) the right to present a claim before a control authority;
- g) when the personal data has not been obtained from the interested party, any person available information about its origin;
- h) the existence of automated decisions, including the creation of profiles, to which referred to in article 22, sections 1 and 4, and, at least in such cases, information significant about applied logic, as well as the importance and consequences provisions of said treatment for the interested party.

2. (...)

3. The person responsible for the treatment will provide a copy of the personal data object of treatment. The person in charge may receive any other copy requested by him interested a reasonable fee based on administrative costs. When the interested party presents the request by electronic means, and unless he requests that if it is provided otherwise, the information will be provided in a user-friendly electronic format like a.

4. The right to obtain a copy mentioned in section 3 will not be negatively affected to the rights and freedoms of others."

As this Authority has done on previous occasions (in Report IAI 54/2018, or in the IAI Report 34/2020, which can be consulted on the website www.apdcat.cat) based on this precept, the claimant not only has the right to know the direct information about him that is being treated by the City Council, and that is part of the file or that is included in the documentation he requests, but that also has the right to know the origin of the information, among other aspects. This could include identifying the Chief Inspector as the source of the information - or someone else if that is the case - given that the Chief Inspector apparently entered the information.

However, this right is not absolute and can be limited, on the one hand, when it may negatively affect the rights and freedoms of third parties (art. 15.4 of the RGPD) and in accordance with the provisions of article 23 of the GDPR:

"1. The Law of the Union or Member States that applies to the responsible or the treatment manager may limit, through legislative measures, the scope of the obligations and rights established in articles 12 to 22 and the article 34, as well as in article 5 to the extent that its provisions correspond with the rights and obligations contemplated in articles 12 to 22, when applicable limitation essentially respects fundamental rights and freedoms and be one necessary and proportionate measure in a democratic society to safeguard:

- a) the security of the State;*
- b) the defense;*
- c) public security;*
- d) the prevention, investigation, detection or prosecution of criminal offenses or the enforcement of criminal sanctions, including protection against security threats public and its prevention;*
- e) other important objectives of general public interest of the Union or of a State member, in particular an important economic or financial interest of the Union or of one Member State, including in the fiscal, budgetary and monetary areas, health public and social security;*
- f) the protection of judicial independence and judicial procedures;*
- g) the prevention, investigation, detection and prosecution of infractions of deontological norms in the regulated professions;*
- h) a function of supervision, inspection or related regulation, including occasionally, with the exercise of public authority in the cases contemplated in the letters a) ae) yg);*
- i) the protection of the interested party or the rights and freedoms of others;*
- j) the execution of civil demands.*

(...)"

According to what is in the file, the City Council argues that the access request must be denied considering the applicability of the limit provided for in article 21.1.b) of the LTC, is that is to say, he understands that the knowledge or disclosure of the information to which the claimant intends to access may lead to prejudice for the investigation or sanction of the disciplinary infraction, since it is pending judicial resolution, given the challenge before the order administrative dispute that was filed against the dismissal of the appeal for replacement of the resolution of the disciplinary file containing the documentation to which access is sought.

In principle, this circumstance could act as a limit for the exercise of the right of access provided for in the data protection regulations, but the arguments adduced by the City Council do not allow concluding that there are circumstances from which it can be appreciated that the claim of access to the data that is the claimant's own, including the origin of the information, could compromise the procedure in progress, or hinder or harm the success of the actions in progress, or could negatively affect the rights and freedoms of third parties.

For this reason, and taking into account the provision of article 15 of the RGPD, from the point of view of data protection there would be no disadvantage in granting access to the person claiming the information contained in the disciplinary file of Mr. A and that it refers to the person making the claim, including information relating to its origin or provenance, that is, to the identification of the reporting person, as well as information on the actions attributed to him or on the effects that they can have on the person who was allegedly affected by the harassment.

V

Without prejudice to the claimant's right of access to the data relating to his person, a the documentation that is sought to be accessed may also include personal data relating to third parties, such as that of the accused in the disciplinary file, other data other than the mere identification of the Chief Inspector of the Local Police, or the authorities and staff at the service of the City Council who have been able to participate in said actions due to their functions.

It is therefore necessary to analyze the limits provided for by articles 23 and 24 of the LTC, as well as article 15 of the LT, in relation to access to information on personal data.

Article 23 of the LTC provides the following:

"Requests for access to public information must be denied if the information sought contains particularly protected personal data, such as those relating to ideology, trade union affiliation, religion, beliefs, 'racial origin, health and sexual 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 by means of a written which must accompany the application."

Article 15.1 of Law 19/2013 establishes that "(...) If the information includes data especially protected to those referred to in section 3 of article 7 of Organic Law 15/1999, of 13 December, or data relating to the commission of criminal or administrative offenses that do not entailed a public reprimand to the offender, access may only be authorized in case of that the express consent of the affected person is counted or if he was covered by one norm with the rank of law."

As can be seen from these articles, the request for access to public information that contains data of this type, such as the data relating to the infractions committed by the accused in the disciplinary file or the data relating to to the mental health of the person allegedly harassed, it must be denied unless the express consent of the person concerned is provided with the request, or the communication is protected by a rule with the rank of law, assumptions that by the available information do not match in this case.

VI

With regard to the rest of the personal data that may be included in the actions to which access is sought, and that is not related to the type of data referred to in article 23 of the LTC, it is necessary to be in the provisions of article 24 of the LTC.

According to paragraph 1 of article 24 of the LTC: *"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 the protection of personal data or other constitutionally protected rights must prevail."

For this purpose, it is also necessary to take into account article 70.2 of Decree 8/2021, of February 9, on transparency and the right of access to public information, from which they are understood as merely identifying data " [...] *the name and surname, the position or position held, body and scale, the functions carried out and the telephone and addresses, postal and electronic, of professional contact*".

However, it provides that *"In cases where the publication or access to an administrative document requires the identification of the author, the location data, the number of the national identity document must be removed, in particular or equivalent document and the handwritten signature. If the signature is electronic, the electronically signed document must be published in such a way that the properties of the electronic certificate used for the signature cannot be accessed."*

In the case of members of the local police, this identification must be replaced by the professional identification number (art. 70.3 of Decree 8/2021).

In the case at hand, there do not seem to be any circumstances from which it can be determined that the right to the protection of personal data or other constitutionally protected rights of the authorities and public employees in the service of the City Council should prevail

they may have participated in the exercise of their powers, so access must be given to their merely identifying data (name and surname, position...) contained therein, with the exception of those relating to their number of the national identity document, or equivalent document (if available), nor the handwritten signature or, in the case of an electronic signature, the properties of the electronic certificate used. It must be said that this consideration also includes the merely identifying information of the Chief Inspector of the Local Police in the event that any action taken by him in the exercise of his powers is recorded in the documentation.

Regarding the rest of the data referring to third parties, it is necessary to take into account paragraph 2 of article 24 of the LTC:

"2. If it is other information that contains personal data not included in article 23, access to the information can be given, with prior weighting of the public interest in disclosure and the rights of the affected persons. 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.

[...]".

In order to carry out the reasoned weighting required by the law of transparency, it is necessary to assess the interest that applies in each specific case, to determine if any limitation applies prevail and that may condition access to public information.

As has been done avinent, the information that can contain the requested documentation corresponds, in part, the one relating to the claimant, including the statements or opinions that the Chief Inspector of the Local Police may have provided about this person. Therefore, in the weighting that must be carried out, a decisive element will be the fact that the data protection regulations recognize the

right to all people to access their own personal information, without appreciating the existence of any limit to the right of access recognized in article 15 RGD, nor any other circumstance in the case examined that advises limiting the 'the claimant's access to his own information.

This means that it respects the information relating to the claimant itself and also respects the information on the identity of the reporting person or other people who may have contributed to the procedure information about the person making the claim, the delivery of the information

VII

According to the City Council, in the requested information there would be no information relating to third parties other than Mr. A., in respect of which it has already become clear that it is not appropriate to hand over the information as it is information protected by article 23 LTC.

However, it seems highly likely that there will at least be information relating to the local Chief Inspector of Police. In this case, the weighting must be done in different terms.

For the purposes of carrying out the weighting, an important element to take into account has to do with the purpose of the access (art. 24.2.b) of the LTC). In this sense, although article 18.2 of the LTC provides that the exercise of the right of access is not conditional on the concurrence of a personal interest, and does not remain subject to motivation or require the invocation of any rule, knowing the motivation for which the person making the claim wishes to access the information may be a relevant element to take into account.

According to what can be seen from the file, the purpose of the access request is to obtain the actions where the Chief Inspector of the Local Police has intervened, where there is information from the claimant, in order to use the self-defense or the filing of actions that the claimant considers appropriate regarding the disciplinary file that has been brought against him.

Despite being a legitimate purpose - the defense of one's own rights and interests -, it is clear that granting access to the purported documentation containing other personal data of the Chief Inspector of the Local Police may have an impact on his private life , either because it could involve disclosing aspects of your privacy that may affect you professionally, or in your social or family sphere, for example, if there are data relating to your address, contact telephone number, etc., or until and all intimate.

On the other hand, it must also be taken into account that the purpose pursued by the transparency law is "to establish a system of relations between people and the public administration and the other obliged subjects, based on the knowledge of public activity, the encouraging citizen participation, improving the quality of public information and administrative management and guaranteeing accountability and responsibility in public management." (article 1.2 LTC), or in other terms, to establish the possibility of offering tools to citizens for the control of the performance of public authorities.

In the case at hand, it does not seem justified to access the rest of the personal information referred to the chief inspector of the Local Police, nor to that of other third parties in case they could also be stated in the documentation, given that the request is not directed to the control of the performance of

the City Council in processing the disciplinary file. On the other hand, there are no elements from which the relevance of this data can be determined (for example, the information on the Chief Inspector of the Local Police as a victim of workplace harassment) for to the intended purpose, given that it is a file in which the claimant is not an interested party.

All this without prejudice to the fact that in the course of the disciplinary procedure of which he has been subject he has already been able to propose the practice of evidence that may be relevant for his own defence.

Therefore, it must be concluded that in the case at hand the right to data protection of the chief inspector would prevail over the right of access exercised by the claimant, given that the claimant's access to data relating to the chief inspector of the Local Police, beyond his identity. Accordingly, access should be denied.

conclusion

The data protection regulations do not prevent access to all the information that the chief inspector of the Local Police has provided about you and that appears in the disciplinary file, including the origin of the information (identification of the reporting person). It would also be possible provide the merely identifying information relating to the authorities and public employees in the service of the City Council who have intervened for the position in the disciplinary file.

However, data protection regulations prevent access to information relating to the accused in the disciplinary file, as well as information in categories with special protection from the Chief Inspector of the Local Police (art. 23 LTC) or other information about it other than merely identifying.

Barcelona, April 8, 2021