

IAI 27/2021

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 a councilor's request for access to a copy of different mayoral decrees in 2020 and 2021.

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 against a city council for the denial of the request access of a councilor to a copy of different mayoral decrees for the year 2020 and 2021.

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 March 23, 2021, it was presented in the town hall register (with number 2021-E-RE-334), an instance of a councilor who, on behalf of his party's municipal group, requests that he be given access to the following information:

"-COPY OF THE FOLLOWING DECREES: YEAR 2021: 205 199 185 181 179 178 177 170 166 122 120 115 75 68 64 63 62 61 60 57 56 37 23 18

-YEAR 2020: 807 790 789 786 783 771"

2. On March 25, 2021, through mayoral decree no. 2021-0272, the city council resolves the request for access to information, with the following operative part:

"First.- Authorize access to the information relating to the requested documentation and records described below to the councilor (...), acting on behalf of the municipal group of the municipal group (...):

-Copy of the Mayor's decrees in 2021: 205 199 185 181 179 178 177 170 166 122 120 115 75 68 64 63 62 61 60 57 56 37 23 18

-Copy of the Mayor's decrees in 2020: 807 790 789 786 783 771

- File 254/2021, from the Municipal Register of vacant properties (IBI surcharge). (...)"

3. On March 30, 2021, the councilor submits a claim to the Commission for the Guarantee of the Right of Access to Public Information (GAIP), for the neglect of the aforementioned access request

and two other requests for access made to the town hall. The GAIP agrees to process the claim in two separate files.

With regard to the request that is the subject of this report, the claimant states in the claim that "(...) the mayor's decrees that had to be reported to the plenary (...) I did not have access to the decrees before the plenary."

4. On March 31, 2021, the GAIP requests the city council to issue a report on the claim submitted, identify the third parties affected by the access, send them the completed file to which it refers and indicate the person or persons who will represent the town hall at the mediation session.

5. On April 15, the city council sends the GAIP the requested report in which it states that:

"In relation to the list of Mayor's decrees that are reported to the Plenary in each regular session, these are attached to the file that is the object of the call in a list that contains the title of the decree, the number of the decree, the date of signature, and the type of procedure. A copy of the decree is provided to councilors who request it.

Likewise, it is reported that the city council (...) makes public to the municipal transparency officer, the list in extract of the Mayor's Decrees issued, for the purposes of complying with the obligations established by Law 19/ 2014, of December 29, on transparency, access to public information and good governance.(...)"

6. On April 19, 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 by means of 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 identity of this person (art. 4.1 of Regulation 2016/679, of April 27, 2016, relating to the protection of natural persons with regard to the processing of personal data and the free circulation of such data and by which repeals Directive 95/46/EC (General Data Protection Regulation, hereafter RGPD).

Therefore, any other limit or aspect that does not affect the personal data contained in the requested information is outside the scope of this report, such as limitations derived from intellectual property rights, to which also refers to the answer given by the city council.

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 object of the complaint is, as can be seen from the statements of the complaining party and the set of information contained in the file, access in his capacity as a municipal councilor to the mayor's decrees prior to plenary sessions.

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."

The RGPD provides that all processing of personal data must be lawful (Article 5.1.a)) and, in this sense, establishes a system of legitimizing data processing based on the need for one of the legal bases to be met established in its article 6.1. Specifically, section c) provides 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".

Article 6.3 of the RGPD establishes that the basis of the treatment indicated in this article 6.1.c) must be established by the Law of the European Union or by the law of the Member States that applies to the person responsible for the treatment.

The reference to the legitimate basis established in accordance with the internal law of the Member States referred to in this article requires that the rule of development, when dealing with the protection of personal data of a fundamental right, has the status of law (Article 53 CE), as recognized in Article 8 of Organic Law 3/2018, of December 5, on the protection of personal data and the guarantee of digital rights (hereinafter, LOPDGDD).

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 Member States that applies to them in order to reconcile public access to official documents with the right to the protection of personal data under this Regulation."

From all this it follows that the councilor's access to the personal data that may contain the decrees requested on the basis of the fulfillment of a legal obligation by the city council (responsible for the treatment (art.6.1. c) RGPD), must necessarily be covered by a rule with the status of law.

According to article 18 of Law 19/2014, of December 29, on transparency, access to public information and good governance (hereafter, LTC) "people have the right to access public information, referred to in article 2.b, in an individual capacity or in the name and representation of any legally constituted legal entity" (paragraph 1). The information contained in the decrees issued by the city council is information prepared by the Administration for the purposes of article 2.b) of the LTC, and therefore remains subject to the right of access in the terms provided for by the legislation of transparency

Now, the second section of the first additional provision of the LTC provides that "access to public information in matters that have established a special access regime is regulated by their specific regulations and, additionally, by this law."

In this case, the person requesting access has the status of councilor of the corporation, and therefore, the assessment that can be made regarding the obligation to provide or not provide personal information of third parties must be examined taking into account the right of access that the local regime regulations attribute to councilors - that is, Law 7/1985, of April 2, regulating the bases of the local regime (LRBRL) and the revised text of the Law municipal and local regime of Catalonia, approved by Legislative Decree 2/2003, of April 28 (TRLMRLC) - regarding that information available to the city council that is necessary for the fulfillment of its function

This without prejudice to the fact that the councilor who requests information must be granted at least the same guarantees regarding access to information as the rest of citizens who do not have this condition of elected office, given the 'supplementary application of Law 19/2014 (additional provision first section 2).

### III

As this Authority has done on previous occasions (among others, the IAI reports 48/2019, IAI 52/2019, IAI 56/2019, IAI 3/2020 or IAI 41/2020, which can be consulted on the web

<http://apdcat.gencat.cat>), local regime legislation recognizes a right of access to all elected officials, regardless of whether they are in the government team or in the opposition, to information about provided by their local corporation and that may be necessary for the exercise of the functions that correspond to them.

Point out that, as can be seen from these reports, the right of access to municipal information corresponds to councilors and not to the municipal group.

Thus, article 77.1 of the LRBRL establishes that "all members of local corporations have the right to obtain from the Mayor or President or the Government Commission any background, data or information held by the services of the Corporation and are necessary for the development of their function".

In the same sense, the TRLMRLC pronounces itself, by providing, in its article 164.1, that "all members of local corporations have the right to obtain (...) all the background, data or information that are in the possession of the services of the corporation and are necessary for the development of its function."

The right to obtain all the antecedents, data or information that are in the possession of the services of the local corporation and necessary for the exercise of their functions, in accordance with repeated jurisprudence on this issue (SSTS September 27, 2002 , June 15, 2009, among others), is part of the fundamental right to political participation enshrined in article 23.1 of the Spanish Constitution, according to which "citizens have the right to participate in public affairs, directly or through representatives, freely elected in periodic elections by universal suffrage."

It should be borne in mind that the elected officials participate in a public action that manifests itself in a wide range of specific matters, such as the right to audit the actions of the corporation, the control, analysis, study and information of the necessary antecedents that have the services of the city council, for their control work and to document themselves for the purposes of adopting decisions in the future (among others, STS of March 29, 2006).

However, the exercise of this right of access to municipal information is in any case subject to certain conditions provided for in the TRLMRLC, cited, and in the Regulation on the organization, operation and legal regime of local entities ( ROF), approved by Royal Decree 2568/1986, of November 28, without prejudice to what may be established by the organization and operation regulations of each local entity.

It is therefore necessary to analyze the legal provisions of the aforementioned regulations in order to assess whether the local regulations or, alternatively, the transparency legislation would enable the transfer of personal data contained in the decrees claimed by the interested party.

#### IV

Article 164.2 of the TRLMRLC provides that "The services of the corporation must provide information directly to the members of the corporations when:

a) Exercise delegated functions and the information refers to matters of their own responsibility. b) These are matters included in the agenda of the sessions of the collegiate bodies of which they are members.

c) It is about access to information or documentation of the local corporation that is freely accessible to citizens

Article 42 of the ROF establishes that "The Mayor will give a brief account to the Corporation, in each ordinary session of the Plenary, of the resolutions that he had adopted since the last ordinary plenary session so that the Councilors know the development of the municipal administration in the effects of control and supervision of government bodies, provided for in article 22,2, a), of Law 7/1985, of April 2".

With respect to this obligation of the mayor to give an account in plenary of the resolutions adopted since the last plenary session, the Supreme Court (Judgment 682/2020 of June 5, 2020, Rec. 2988/2017) has established doctrine in the meaning of including in this obligation all the resolutions issued by the mayor, including those issued by the Local Government Board by its delegation, as well as the obligation to "dedicate part of the session to the control of the organs of government of the corporation, ex article 46.2.e) of the LBRL, by means of a specific section, which has its own substance, distinct and apart from the section relating to "requests and questions".

The Mayor's obligation to give an account to the Plenum of the decrees or resolutions adopted by the municipal governing bodies is part of the ordinary sessions of the Plenum, and the notification of the decreed resolutions allows the councilors to inspect them, and control- them, formulating in that same session or in the following one, questions, requests and interpellations, as an indispensable control mechanism of the activity of the municipal administration and therefore, directly connected with the exercise of control functions and control they have attributed, recognized in article 22.2.a) LBRL.

For the purposes of making this control and supervision effective, in the course of the ordinary functioning of the plenary sessions, the members of the corporation must be able to know all the relevant aspects of the decisions adopted by the governing bodies, and this includes not only the object of the resolution, but also the identity of the people who have been affected by it (to whom a license has been granted, to whom a contract has been awarded, to whom aid has been granted, etc.), as well as the reasons or foundations that justify the decision taken in each specific case, even accessing the full text of the resolutions. Only in this way can the effective control of the activity of the municipal administration be guaranteed.

Direct access does not mean, however, that there is a right to indiscriminate access to mayoral decrees. It must be taken into consideration that the type of personal information contained in the decrees can be of different nature and affect the privacy of the recipients to a greater or lesser degree. There may be information related to special categories of data (Article 9 RGPD), data included in this category with a specific regime (intimate information, data relating to administrative or criminal offences), or data deserving of a special reservation or confidentiality in attention to the concurrence of certain qualified circumstances (for example, situations of social vulnerability, data of minors, data related to gender violence, or that allow the possibility of drawing up socio-economic profiles, etc.).

In accordance with the principle of data minimization "personal data will be adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed" (Article 5.1.c) RGPD).

In this case, the application of the principle of data minimization implies that the processing of essential data to fulfill the purpose of control and inspection attributed to councilors is justified.

In such a way that, before making available to the councilors the information that forms part of the agenda of the plenary session, the city council must take the appropriate measures, which may vary in each case (for example provide the information aggregated or partially deleting from the decree information that can be considered special categories of data or deserving of special protection) in order to facilitate access to information without violating the right to data protection. Thus, for example, in the case of subsidies for reasons of vulnerability, it will be necessary to eliminate the information relating to the beneficiaries; in the case of sanctioning files, the amount of the fines imposed and the reasons can be provided, but for the purposes of monitoring the municipal action, general access that would allow the identification of all the affected people does not seem justified; or, for example, in any resolution that involves an action in relation to people related to situations of gender violence, it would be necessary to delete the information of the people affected, etc.

This, without prejudice to the fact that there may be some specific exceptional case in which, prior to the request of the councilor, justified reasons are presented that demonstrate the need to obtain said information for the exercise of its control functions and inspection

Therefore, access to the full content of these resolutions adopted by the governing bodies, (with the considerations made regarding the special categories of data or others that require special protection) would be justified by the obligation to inform the members elected, the resolutions issued since the last session of the Plenary for the purposes of control and supervision of the actions of the Municipal Administration, in accordance with articles 164.2 b) TRLMRLC and 42 ROF. In this sense, it does not seem that the right of the councilor to obtain from the city council direct access to the information contained in these decrees, except for the aforementioned information, can raise doubts from the perspective of the personal data protection regulations that requires special protection.

In the case at hand, the city council on March 25, 2021 agreed to authorize access to a copy of the mayoral decrees requested, however, the claim presented by the councilor is based on the fact that it was not facilitate access prior to the meeting. In this sense, the city council's report issued at the request of the GAIP, states that with regard to "the list of mayoral decrees that are reported to the Plenary in each ordinary session, these are attached to the file object of call in a list that contains the title of the decree, the number of the decree, the date of signature, and the type of procedure. A copy of the decree is provided to councilors who request it."

It is worth saying that, in the case of article 164.2.b), direct access has the purpose of allowing the councilor to know all the necessary elements to be able to control or supervise the actions of the governing bodies in the plenary where they treat without the need to formulate a formal request and

undergo an authorization procedure. The right to data protection would therefore be limited in a justified way, in the terms set out, to the extent that it is information necessary for the exercise of the functions attributed to the councillor. And this, even if, as in the case at hand, the information continues to be claimed once the date of the plenary session where it was supposed to be discussed has already passed, insofar as it is information in to which the councillor could have had direct access before the plenary session.

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Finally, it should be remembered that whenever the councillor's access to personal data is carried out due to the functions entrusted to him as such, he must be governed, aside from the duty of reservation imposed by the regulations of local regime (article 164.6 TRLMRLC), by the principle of purpose limitation (article 5.1.b)) and by the principle of integrity and confidentiality (article 5.1.f)) established in the RGPD.

Thus, article 164.6 of the TRLMRLC provides: "the members of the corporation must respect the confidentiality of the information to which they have access by virtue of their position if the fact of publishing it could harm the interests of the local entity or third parties."

Likewise, in accordance with the principle of purpose limitation (Article 5.1.b) RGPD), any use of personal information after access by the councillor should also be based on a legitimate purpose.

For its part, in accordance with the principle of integrity and confidentiality (Article 5.1.f)) RGPD "personal data will be treated in such a way as to guarantee adequate security of personal data, including protection against non- authorized or illegal and against accidental loss, destruction or damage, through the application of appropriate technical or organizational measures."

## Conclusions

The data protection regulations do not prevent the councillor from direct access to mayoral decrees that must be brought to the attention of the plenary.

Before making this information available, it is necessary to exclude information related to special categories of data (art. 9 RGPD), or other information deserving of special protection (intimate information, criminal or administrative violations, or any other that suppose to reveal information about people who require special protection, for example, situations of social vulnerability, data on minors, data related to gender violence, or that allow the possibility of drawing up socio-economic profiles, etc.). This, without prejudice to the fact that there may be some specific exceptional case in which the councillor can justify the need for access to this data to exercise his control and inspection functions.

Barcelona, May 7, 2021