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 the partial estimate of an entity in the request for access to the disciplinary records of the last five years

The Commission for the Guarantee of the Right of Access to Public Information (GAIP) asks the Catalan Data Protection Authority (APDCAT) to issue a report on the claim submitted in relation to the partial estimate of an entity in the request for access to the disciplinary records of the last five years.

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 January 26, 2021, a request is submitted addressed to an entity to which access to the sanctioning files initiated in the last five years is requested.

The applicant alleges that, as an elected delegate, he must have this information in order to carry out the task of representing and defending the rights of the organization's workers.

2. On March 1, 2021, the entity forwarded to the applicant, in response to the request, a list of the disciplinary proceedings instituted in the last four years, distributed by year and including in each respect one file number, type of offense (mild, serious, very serious), the sanction that was imposed, and the last four digits and letter of the identity identification number (DNI) of the sanctioned workers.

3. On March 18, 2021, the applicant submits a claim in which he states that although the entity has responded to the request, it has not provided the requested information. In particular, he states that "the requested information has not arrived in the way I requested it. Neither the requested content nor the format. We didn't ask for a report, but the files."

4. On April 1, 2021, the GAIP will send the claim to the entity, requesting a report that sets out the factual background and grounds its position in relation to the claim, as well as the complete file and, if where applicable, specifying the third parties affected by the claimed access.

5. On April 15, 2021, the entity sends GAIP a legal report in which it alleges that based on the access request submitted by the claimant, it did not understand that he was actually requesting a copy of all disciplinary records for the last five years.

In relation to this requirement, he considers that the claimant's claim "[...] would involve a complex task of elaboration or re-elaboration, since the documentation would have to be transferred

to the 26 workers affected by the disciplinary proceedings, who would have rights or interests that would clearly be affected.

Likewise, these disciplinary files contain personal data, which, despite being hidden, could be affected by the limits to the right of access to public information established in article 21.1.c of Law 19/2014 (the secret or confidentiality in the procedures processed by the Public Administration), since anonymization would not be sufficient to keep hidden the identity of the workers who are the subject of the requested files. Therefore, data or personal circumstances protected by the regulations governing data protection and the confidentiality required in labor relations could be highlighted.[...]"

Finally, he points out that the claimant "[...] acts on behalf of the union "[...]", which is present at the Works Committee [...], which has already been heard of all disciplinary files for very serious infractions. Beyond that, as a representative of the workers [...], the claimant can access this information in his capacity as a trade union delegate or as a member of a trade union present on the Works Committee".

6. On April 19, 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 the 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 security 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 Directive 95/46/CE (General Data Protection Regulation, hereafter RGPD) is repealed.

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".

From another perspective, therefore, the RGPD will not apply to anonymous information, that is, from which there is no mere reasonable probability of directly or indirectly identifying a natural person (recital 26 of the RGPD).

Article 4.2) of the RGPD considers "treatment": any operation or set of operations carried out on personal data or sets of personal data, either by automated procedures or not, such as collection, registration, organization, structuring, conservation , adaptation or modification, extraction, consultation, use, communication by transmission, diffusion or any other form of enabling access, comparison or interconnection, limitation, deletion or destruction".

In accordance with the provisions of article 5.1.a), any processing of personal data must be lawful, loyal and transparent in relation to the interested party and, in this sense, the RGPD establishes the need to participate in some of the legal bases of article 6.1, among which section c) provides for the assumption that the treatment "is necessary for the fulfillment of a legal obligation applicable to the person responsible for the treatment".

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

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

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

In the case at hand in which a copy of the disciplinary proceedings instituted in the last five years is requested, it can be concluded that this information must be considered public information for the purposes of article 2.b) of the LTC as a result of their competences.

The first additional provision of the LTC, in the second section, 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".

Therefore, and to the extent that from the documentation contained in the submitted file it is deduced that the claimant holds the status of representative of the workers, it will be necessary to take into account the provisions that specifically regulate the access of the representatives of the workers to certain information.

And bearing in mind that, as indicated, he would be a trade union delegate and a member of the works committee, it seems that the information requested would refer only to labor staff (staff whose representation is attributed to the works committee), and not to the rest of the staff.

Article 2.4 of Decree 214/1990, of July 30, which approves the Regulation of personnel in the service of local entities, provides that "The selection and provision of jobs for labor personnel is governed by the regulatory system which is mentioned in the previous points. The regime of the relations of this staff will be in its entirety that established by the rules of labor law."

Consequently, the provisions established by the labor regime legislation will apply, mainly Royal Legislative Decree 2/2015, of October 23, which approves the revised text of the Workers' Statute Law , when the claimant holds the status of representative of the workers, and the Organic Law 11/1985, of August 2, on Trade Union Freedom, given the position of trade union delegate.

III

In accordance with the provisions of Royal Legislative Decree 2/2015, of October 23, which approves the revised text of the Workers' Statute Law (from now on, the ET), the company committee is the representative and collegial body of all the workers in the company or workplace for the defense of their interests - which must be set up in every workplace that has a census of fifty workers or more - (article 63.1 ET), and it is his responsibility to carry out the tasks, among others, of monitoring compliance with the rules in force in labor matters, Social Security and employment, and also the rest of the pacts, the conditions and the company practices in force, and formulation, if applicable, of the appropriate legal actions before the employer and the competent bodies or courts (art. 64.7.a.1 ET), as well as to inform their represented on certain topics provided for in the regulations that, directly or indirectly, have or may have an impact on the employment conditions (art. 64.7.e) ET).

In relation to these tasks, article 64.1 of the ET recognizes the works council's right to be informed and consulted by the employer on issues that may affect workers, as well as on the situation of the company and the evolution of employment in the company, and in particular, for the purposes that interest us in this report, the right is recognized to be informed as often as appropriate in each case regarding the sanctions imposed for very serious offenses (art. 64.4.c ET).

For this purpose, in accordance with what is stated in article 64.1, second paragraph, "Se entiende por información is the transmission of data by the employer to the company committee, so that it has knowledge of a certain question and can proceed to your examination.[…]"

In relation to this information procedure, the Superior Court of Justice of Andalusia (Sala Social, section 1ª), in judgment no. 1284/2017, of April 27, explained in relation to a case related to the imposition of a very serious offense related to a dismissal, that this procedure "has the purpose of having the legal representation of the workers advise them against the exercise of the company's disciplinary power, so this communication must be prior or simultaneous to the adoption of the dismissal, since it is known that to contest the business decision there is a 20-day statute of limitations for both dismissals and sanctions competent, in accordance with articles 103.1 and 114.1 of the Social Jurisdiction Law, so that the communication later, several months after the dismissal is not supposed to comply with its obligation to inform the Company Committee of the imposition of these sanctions according to the rules of good faith.

The company cannot defend itself in the fact that the workers will refuse to communicate the disciplinary dismissal to the Works Council, which has not been proven, since there are many ways to fulfill their obligations and communicate the imposition of sanctions without identify the affected worker, since the fulfillment of this obligation is fulfilled by providing the information, but it is also a requirement for the validity of the disciplinary dismissal to be provided in this way in article 24.3 of the XVI State Collective Agreement of Empresas de Consultória Estudios de Mercado y de la Public Opinion, which establishes the obligation to notify the legal representation of the workers of the imposition of serious or very serious faults, because it is not understood why it was not done risking the company to a declaration of inappropriateness of the dismissal, the which leads us to the dismissal of this ground of appeal. […]"

Based on what the proposed provisions provide, it is appropriate to emphasize the fact that the right to information recognized in the regulations is only recognized in the case of sanctions imposed by the commission of very serious infractions, excluding information relating to the imposition by the commission of minor and serious offences, access to which will need to be subjected to analysis from the perspective of the transparency regulations.

It should be borne in mind that the regulations governing the public function of the Generalitat (applicable to the staff of local bodies by virtue of what is established in article 300.1 of the revised text of the Municipal and Local Regime Law of Catalonia, approved by Legislative Decree 2 /2003, of April 28, also provides for the communication of the workers' representatives of minor and serious infractions (art. 118.1 of the revision of the legal texts in force in the field of public service approved by Legislative Decree 1/1997, of 31 (October).However, this is a provision applicable only to civil servants of local bodies.

On the other hand, it is also important to bear in mind that the workers' right to information is fulfilled by the employer communicating the imposition of a penalty for the commission of a very serious offense so that the workers' representatives could offer advice to sanctioned workers, but would not include full access to the file.

In short, the ET would enable the claimant, as a member of the works committee, to access information relating to the imposition of very serious sanctions (including identity, offense committed and sanction imposed) but not to the disciplinary file complete

On the other hand, it should be borne in mind that, in his capacity as a trade union delegate, article 10.3 of Organic Law 11/1985, of August 2, on Trade Union Freedom (henceforth, LOLS) provides for the following :

> **"Union delegates, in the event that they are not part of the works committee, will have the same guarantees as those legally established for the members of the works committees or the representative bodies that are established in the**
> **Public administrations, as well as the following rights except for what could be established by collective agreement:**
>
> **1.º Have access to the same information and documentation that the company makes available to the works committee, union delegates being obliged to keep professional secrecy in those matters in which they legally proceed. […] 3. To be heard by the company prior to the adoption of measures of a collective nature that affect workers in general and those affiliated with their union in particular, and especially in the dismissals and sanctions of the latter."**

Article 57.B) of the entity's collective labor agreement is pronounced in similar terms.

In accordance with the provisions of the aforementioned regulations, the LOLS recognizes the right of trade union representatives to be heard prior to the adoption of measures relating to the imposition of sanctions on its members, whether in relation to a minor or serious offence. or very serious

It should be noted that the regulations recognize this right only for workers affiliated to the union to which the union delegate belongs, therefore, the cases of unaffiliated workers would be excluded from this right, access to which will have to be analyze in accordance with the transparency regulations - an issue to which we will refer below -.

In relation to this hearing procedure, the Judgment of the Supreme Court (Social Chamber, Section 1), of June 12, 2006, unifying doctrine, provides that "[...] the institutional function of the mandatory procedure of audiencia a los delegados sindicales [...] is not the notification of a business agreement merely pending execution, but the communication of a project of sanction or dismissal whose firm decision can be influenced by the information provided by the union delegate to the employer on certain aspects or particularities of the behavior and situation of the affected worker"; that "the raison d'être of this prior hearing procedure is "the convenience appreciated by the legislator that unionized workers have a reinforced protection against the disciplinary power of the employer, to whose risk of abuse they may be more vulnerable", by means of a "preventive trade union defense of the affiliated worker" [STS 05/23/95 (RJ 1995, 5897) –rec. 2313/94–]; […] then it is a "procedure intended to influence the projected disciplinary decision in a preventive way [...]" »

In accordance with the provisions of this ruling, the purpose of the hearing procedure for union delegates is to offer a preventive possibility that allows them to participate and, if necessary, influence the disciplinary decision that the employer intends to adopt in relation to with the commission of an offense by a member of the union to which he belongs.

Taken to the case at hand, it does not appear that the request for access to the disciplinary files of the last five years refers directly to this purpose of prior advice. For this reason, it will be necessary to analyze access based on the regime of the right of access to public information provided for by the transparency legislation, given its supplementary applicability (DA1a. section 2 of the L

IV

According to what has been explained, the specific regime of access for the representatives of the labor staff of the local bodies, can justify the access to the information about the very serious sanctions imposed on us in the last five years. However, beyond that, and with regard to the rest of the information requested, the right of access to the disciplinary proceedings instituted in the last five years will have to be analyzed in accordance with the regime of access to the public information provided for in the transparency regulations, given its additional applicability (DA1a. section 2 of the LTC), and with the same guarantees as for the rest of the citizens.

It should be borne in mind that 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 to personal data.

In relation to article 23 of the LTC, for certain categories of data, it 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 sex life, and also the

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."

In principle, it does not seem that among the information that can be found in the disciplinary files there must be information that can fit into the data categories listed in article 23 LTC. It should be borne in mind that the information associated in itself with a disciplinary offense committed by a worker subject to labor law, despite being information that can be considered very sensitive, cannot be considered included in the category of administrative offenses to which refers to article 23.

However, it is not possible to rule out the possibility that the disciplinary files to which access is sought may contain information relating to the categories of data included in article 23 of the LTC. If so, access to that information should be denied.

In the rest of the cases, that is, when the disciplinary file does not contain categories of personal data referred to in article 23 of the LTC, it will be necessary to take into account article 24 of the LTC, the which provides for the following:

"1. Access to public information must be given if it is information directly related to the organization, operation or public activity of the Administration that contains merely identifying personal data unless, exceptionally, in the specific case it has to prevail over the protection of personal data or other constitutionally protected rights.

2. If it is other information that contains personal data not included in article 23, access to the information can be given, with the previous reasoned weighting of the public interest in the disclosure and the rights of the people affected. To carry out this weighting, the following circumstances must be taken into account, among others:

a) The elapsed time.

b) The purpose of the access, especially if it has a historical, statistical or scientific purpose, and the guarantees offered.

c) The fact that it is data relating to minors.

d) The fact that it may affect the safety of people.

[...].”

In accordance with this article, the analysis of the request for access to the disciplinary records of workers in which data referred to in article 23 of the LTC is not affected, must go through a previous reasoned weighing between the public interest in the disclosure and the right of the affected persons. In this weighting it is necessary to take into account all the circumstances that affect each specific case with the aim of elucidating the prevalence between the right of access and the rights of the affected persons, taking as a basis the different elements listed in the aforementioned article.

Article 18.2 of the LTC provides that the exercise of the right of access to public information is not conditioned on the fact that a personal interest is involved, as well as not remaining subject to the motiva

invocation of any rule, knowing the motivation of the request can be a relevant element to take into account.

In the case at hand, the claimant has stated that the purpose of the request is "[...] to be able to perform the task of representing and defending the rights of the workers of [...]".

As a first element to take into account, it is necessary to take into account that the labor regulations already regulate the rights of collective representation and, in particular, the right to participate in the company through the representative bodies (personnel delegates or company committee, according to each case) who are guaranteed competences in order to defend the rights and interests of workers. At the same time, the trade union regulations also confer special protection on workers who are affiliated to a trade union through the information given to

On the other hand, from the point of view of the transparency regulations, it should be taken into account that the purpose it pursues 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, 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 in other words, to establish the possibility of offering tools to citizens to control the performance of public authorities.

This purpose, of controlling the entity's performance, can be carried out through knowledge of the existence or not of disciplinary sanctions, the types of sanctions, and the types of facts or areas in which they have been produced, without the need to identify or make the affected peopl

It should be borne in mind that although these are not special categories of data, the fact that a person has been affected by a disciplinary sanction at work can have clearly harmful consequences for the persons affected (equivalent to those that could have the disclosure of the commission of an administrative disciplinary offense to which the regime of article 23 LTC would apply).

Access to disciplinary files could have a highly intrusive effect on the private lives of sanctioned workers, either because it could lead to revealing aspects of their privacy that could affect them professionally. Even, although a priori it seems unlikely, it cannot be ruled out that the documentation contained in said files may also contain personal information that affects third parties, for example if there is a complaint from a person or colleague of work where the worker's misconduct is reported.

From what has been explained, it can be concluded that in the case of information on files processed for members of the union that he represents as a union delegate, although as we have seen the provisions of article 10.3 LOLS they only justified their access during the processing of the procedure and as long as the affected subjects were members of the union, the weighting of the concurrent elements, especially the fact that the affect for the affected person would not be more relevant than that already derived of LOLS itself (given that as a trade union delegate he could already have had access to this information during the processing of the files), he must lead to granting access to the processed files to affiliates of his union.

Apart from the cases affecting members of the union, it must be concluded that in the case at hand the right to data protection of the persons affected in the disciplinary proceedings would prevail over the right of access exercised by the claimant. Consequently, a priori access to the disciplinary files should be denied, without prejudice to what has already been explained regarding the possibility of communicating to the members of the works committee the sanctions imposed for very serious infractions.

However, it is necessary to bear in mind the provisions of article 25 of the LTC and article 68.2 and 70.5 of Decree 8/2021, of February 9, on transparency and the right of access to public information (from now on, RLTC), which foresee the possibility of giving partial access, when the concurrence of a limit justifies it and that "In cases where, in application of the reasoned weighting of article 24.2 of the Law 19/2014, of December 29, access to public information containing personal data is denied, public administrations, in application of the principles of proportionality and partial access, must grant access to the rest of the information , prior to anonymization or pseudonymization of this data, when possible."

To this end, article 70.6. of the RLTC provides that, with regard to this rule, anonymization will be equivalent to "the elimination of the personal data of the affected natural persons contained in the information and any other information that can allow them to be identified directly or indirectly without disproportionate effort, without prejudice to being able to maintain, where appropriate, the merely identifying data of the positions or personnel in the service of the public administrations that dictate or intervene in the administrative act". And by pseudonymization "the processing of personal data in such a way that they cannot be attributed to an interested person without using additional information, provided that this information is recorded separately and is subject to technical and organizational measures aimed at ensuring that personal data are not attributed to an identified or identifiable natural person."

In accordance with these articles, and considering that through the reasoned weighting required by article 24.2 of the LTC it is necessary to deny the intended access, the entity must verify if despite this it is possible to grant access to the files disciplinary claims previously anonymized or pseudonymized, from the point of view that there is no reasonable risk of identification of the sanctioned workers without disproportionate efforts.

It should be noted that providing the information with the last four digits and the no. of DNI cannot be considered as pseudonymisation, given that it is highly likely that other people based on this information can establish the link with the identity of the affected person. In fact, pseudonymisation does not seem to be an adequate solution in the case at hand, given that it does not seem to bring any advantage over anonymisation (always the most recommended option from the point of view of the minimization principle) as it is not justified that preserve the link with the identity of the affected persons.

Therefore, the anonymization would proceed. And in the event that there is a risk of re-identification, the information should be aggregated, so that this possibility disappears.

In accordance with the provisions of Opinion 05/2014 on anonymization techniques of the Data Protection Working Group of article 29, aggregation is an anonymization technique that must prevent "[...] that an interested party is singled out when it is grouped together with, at least, a number k of people. To achieve this, the values of the attributes are generalized to the point

that all people end up sharing the same value. For example, by reducing the granularity of a place (city or region), many interested parties will share those values [...]"

That is to say, the information should be delivered with a level of generalization that does not allow identification. As the person responsible for the treatment, the entity must assess the risk and the possibility of subsequent re-identification of the workers in relation to the level of aggregation necessary to apply, so that the information sent reaches the necessary generalization to avoid the risk , however remote, of re-identification, such as, for example, grouping all sanctions without distributing them by years in which they were imposed, or without distributing them by job categories, if this can allow identification.

conclusion

From the point of view of the data protection regulations, the access of the claimant, trade union representative and member of the works committee to the content of the disciplinary files processed in the last five years is not justified.

However, given his status as a member of the works committee, the claimant would have the right to know the information relating to the imposition of sanctions on workers for the commission of very serious infractions (infraction committed and sanction imposed, with identification of the affected persons) and as a trade union delegate he would also have the right to access the files processed for members of his trade union.

Barcelona, May 7, 2021