

IAI 31/2021

Report issued at the request of the Commission for the Guarantee of the Right of Access to Public Information in relation to the claim presented by a citizen against an Irrigation Community for the denial of access to the user register

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 an Irrigation Community for the denial of access to its user register

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

Background

1. On March 25, 2021, a citizen wrote to the Irrigation Community (...) in the following terms:

"EXHIBITION: (...)

requests to know the user register of (...)

MANIFESTO: That by virtue of law 19/2014 of December 29 on transparency, access to public information and good governance, I request: Number, Domicile of notifications, Polygon, Plot, Surface, water use rights and annual fee . From the users of the municipalities of (...)."

2. On April 6, 2021, the Irrigation Community informs the applicant that:

"(...) in compliance with the General Data Protection Regulation (EU 2016/679 (RGPD) and Organic Law 3/2018 on the Protection of Personal Data and Guarantee of Digital Rights we cannot provide you with this information."

3. On April 21, 2021, the applicant submits a claim to the GAIP against the Irrigation Community for denial of access to the requested information.

4. On April 26, 2021, the GAIP requests this Authority to issue the report provided for in article 42.8 of Law 19/2014, of December 29, on transparency, access to public information and good governance, in relation to the claim presented.

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 security of this person (article 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 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

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".

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."

Law 19/2014, of December 29, on transparency, access to public information and good governance (hereafter, LTC), aims to regulate and guarantee the transparency of public activity.

Article 18 of the LTC recognizes the right of people 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 person" (section 1).

Article 2.b) of the LTC 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 that supplied by the other obliged subjects in accordance with the provisions of this law".

This claim is lodged against the denial of access to the user register of the Community of Regants (...).

Given this, it is necessary to analyze, first of all, the legal nature of this entity and the subjection to the LTC.

III

The revised text of the Water Law, approved by Royal Legislative Decree 1/2001, of July 20 (TRLA), provides, in its article 81.1, that:

"1. The users of water and other goods of the hydraulic public domain of the same intake or concession must be formed into user communities. When the destination given to the waters was mainly irrigation, they will be called irrigation communities; in another case, the communities will receive the qualifier that characterizes the destination of the collective benefit.

The statutes and ordinances will be drawn up and approved by the users themselves, and must be submitted, for their administrative approval, to the Basin Organization.

The statutes and ordinances will regulate the organization of the communities of users, as well as the exploitation in a regime of internal autonomy of the hydraulic goods inherent in the use.

The Basin Organization cannot deny the approval of the statutes and ordinances, nor introduce variants in them, without prior opinion of the Council of State."

According to article 82.1 of the TRLA:

"1. The communities of users have the character of corporations under public law, attached to the Basin Organization, which will ensure compliance with its statutes and ordinances and for the good order of use. They will act in accordance with the procedures established in this Law, in its regulations and in its statutes and ordinances, in accordance with the provisions of Law 30/1992, of November 26, of

Legal Regime of Public Administrations and Common Administrative Procedure.”

In accordance with these legal precepts, article 1 of the Statutes of the Community of Irrigation provides that:

"The owners, irrigators and other users of the assets assigned to the use of surface waters of the river (...), located in the municipal area of (...) and called (...), constitute a community of irrigators called (...), which will have the character of a public law corporation attached to the Catalan Water Agency, in accordance with the provisions of articles 82 of Royal Legislative Decree 1/2001, of July 20 , which approves the revised text of the Water Law and 199 of the Hydraulic Public Domain Regulation, approved by Royal Decree 849/1986, of April 11. (...)."

Article 3.1.b) of the LTC establishes that this Law is applicable, among other taxable subjects, to public law corporations "in what affects the exercise of their public functions".

Consequently, the transparency legislation is applicable to the Community of Irrigators with the scope indicated, that is to say, in what affects the exercise of its public functions.

Therefore, it is necessary to analyze whether the information requested from the Community of Irrigation can fit within the exercise of the public functions attributed to it by the legislation that governs it or delegated by the public administration.

In accordance with the TRLA, the primary public function of the Irrigation Communities is to administer and distribute among their members the collective use of public waters subject to concession (article 81).

In this same sense, the Constitutional Court has pronounced in Judgment 227/1998, of November 26: "in the case of Public Law Corporations as is the case of the communities of public water users, whose purpose is not other than the autonomous management of the hydraulic assets necessary for the collective use of them, in the participation regime of the interested parties" (FJ 24).

For the exercise of this function, the TRLA attributes to them a series of administrative powers typical of the administrative police, such as, among others: executing agreements in the corporate sphere (article 84.5), use of the road of coercion for the collection of their debts (article 83.1 and 4), the nature of beneficiaries of forced expropriation and the imposition of servitudes (article 83.2), sanctioning power (article 84.6), etc.

The attribution of these powers justify that their exercise is subject to the tutelage of the Administration (the Basin Organization or the corresponding regional hydraulic administration (DA4a TRLA)), which exercises it through the approval and modification of its statutes and ordinances, and of the appeal against the agreements of the General Meeting and the Governing Board of the Community of Regents.

For its part, article 199 of the Regulation of the hydraulic public domain, approved by Royal Decree 849/1986, of April 11, states that "the User Communities realize, by mandate of the Law

and with the autonomy that is recognized in it, the functions of police, distribution and administration of the waters that they have granted by the Administration.”

It should also be noted that the jurisprudence (for all, the STS 207/1994, of March 14) has pointed out that "in no case, the private base substratum that integrates these sectoral corporations must be ignored. Therefore, the administrative powers or faculties are exercised by delegation or specific attribution", as well as that "in reality, their conformation as Public Administrations is exclusively determined by the extent to which they hold public functions granted by law or delegated by the Administration In this way, the Irrigation Communities are assigned the organization of irrigation use, jurisdictional powers by means of the Irrigation Jury and police of the turns of water, canals and other collective facilities" (FJ II).

In view of this, it can be said that if the access requests are not related to these public functions of the Irrigation Communities, the requested information could not be considered public and, therefore, that access could be protected by the LTC, given that it would be information that would affect the private activity of the Community of irrigators.

In the present case, the claimant requests the register of users of the Community of Irrigation (...), specifically, the data relating to the name, address for notification purposes, polygon, plot, surface area, rights of water use and annual fee.

The TRLA (article 81) and the Royal Decree 849/1986, of April 11, already cited (article 201 et seq.), include as necessary the initial formation of the register at the mandatory moment when the Community is established of irrigators Both rules start from the user register and/or census as the cornerstone of the operation of the Community and for the exercise of the rights and demands of the obligations, given that it is from this register that the corporation can administer and exercise police powers over authorized flows.

In this sense, article 4 of the Statutes of this Community of irrigators provides that:

"They are members of the Community and include all the owners of the farms in their territorial area that take advantage of the water or use the network of community drains and who are related in the register of users, which the Community will keep rigorously up to date , who have subscribed to the corresponding policy in which the point of water intake and drainage is stated, as well as the rights to use the water of each of the commoners, the watering shifts that pertain to them, the participation of each member in community expenses and the number of votes that correspond to them."

Although this Authority is aware of decisions by other bodies in matters of transparency that have considered that this register contains data that may be considered necessary in relation to the interests or private purposes of the Community of Irrigation (criterion supported by the Consejo de Transparencia and Good Government (among others, R/238/2018, R/475/2019 or R/682/2019)), this Authority considers that the Irrigation Community has this information for the exercise of its functions public services entrusted to him. Therefore, the information contained in the register must be understood as "public information" for the purposes of the LTC and, therefore, is su

IV

Despite what has just been stated, the right of access to public information (Article 18 LTC) is not absolute and may be denied or restricted for the reasons expressly established in the laws (Article 20 et seq. LTC). 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.

Taking into account that the information requested regarding the register of users of the Community of irrigators by the person claiming (identification data and address of the users, data of the farm - polygon, surface area and plot-, water use rights and annual fee) does not seem likely to contain particularly sensitive information such as that contained in article 23 of the LTC, the application will result article 24.2 of the LTC, according to which:

"1. (...).

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 article 18.2 of the LTC, the exercise of the right of access is not subject to motivation, but the fact that the applicant expresses what is the purpose he pursues and ultimately the reasons for which he is interested knowing the information adds a very important element to be taken into account as a weighting criterion between the public interest in the disclosure of the information and the rights of the people affected.

In the present case, the person making the claim does not state in the access request or in the letter of claim a motivation that justifies the interest to be satisfied by obtaining the requested information.

The requested access should in any case be understood as framed within the purpose of the transparency law itself, which, in accordance with its article 1.2, is "to establish a system of relationship between people and the public administration and the other obliged subjects, based on the knowledge of public activity, the encouragement of citizen participation, the improvement of the quality of public information and administrative management and the guarantee of the retention of accounts and responsibility in the public management."

The information requested by the claimant includes the identity of the members of the Community of irrigators, their address for the purposes of notifications, data on the property (polygon, plot and surface area), the rights to use the water and the annual fee they are required to pay.

The address alone constitutes data that allows the location of the person it refers to, with respect to which it is necessary, in general, to guarantee its confidentiality, in no

constitute relevant information for the control of the performance of the public functions exercised by the communities of irrigators.

But, beyond that, it must be taken into account that access to the data linked to the irrigation fee that the members of the Community of irrigators must pay annually would entail the communication of data of a tax nature.

Article 111.1 bis of the TRLA provides that:

"1. The competent public administrations, by virtue of the principle of cost recovery and taking into account long-term economic projections, will establish the appropriate mechanisms to pass on the costs of services related to water management, including environmental and resource costs, in the different end users. (...)"

In this sense, the TRLA regulates a series of fees, which are considered administrative fees: fee for the use of assets in the hydraulic public domain (article 112), fee for the use of continental waters for energy production electricity (article 112 bis), fee for the control of discharges (article 113) and, for the purposes concerned, fee for regulation and water use fee (article 114).

Article 115.3 of the TRLA establishes that:

"3. The payment of the levies provided for in this Law, when those obliged to do so are grouped in a community of users or an organization representative of them, may be made through such communities or entities, which are authorized for this purpose to take the corresponding collection is carried out, in the terms that are established by regulation."

Article 2.2.a) of Law 58/2003, of December 17, general tax (LGT) defines the rates as "the taxes whose taxable purpose consists of the private use or the special use of the public domain, the provision of services or the performance of activities under public law that refer to, affect or benefit the taxpayer in a particular way, when the services or activities are not requested or voluntarily received by the taxpayers or are not provided or performed by the sector private."

Article 95 of the LGT establishes the reserved nature of information of a tax nature and regulates the different cases of exception to this limitation (taxed cases of transfer of data to other administrations or authorities for the exercise of the respective powers), among which, it must be said, the possibility of delivering it to individuals is not envisaged.

However, this does not necessarily mean that citizens cannot access tax information, given that the provisions on the right of access of the transparency legislation are equally applicable, although, in the weighing between opposing interests to which refers to article 24.2 of the LTC, the special nature of this type of information must be taken into account.

On this matter, mention should be made of the recent STS 257/2021, of February 24 (FJ III):

"(...) the LGT and singularly, its article 95 - in which the negative decision is based enshrine a rule or general guideline for the reservation of "data with tax significance" in the scope of the functions of the Tax Administration - the management and application of taxes - but they do not allow us to claim that they contain a complete and alternative regulation on access to information that involves the displacement of the general regime provided for in Law 19/2013, on Transparency, a basic rule applicable to all Administrations public (...)

The General Tax Law must be interpreted in the entirety of the legal system and in the light of the new guarantees introduced in Law 19/2013, on Transparency, which leads to the conclusion that its regulation does not exclude or foresee the possibility that it can be collected information (...) when the data held by the Administration may be necessary for citizens to assert their rights, or may be informed of public action, information that must conform to the limits set by the Transparency Law itself establishes in its article 14 and the data protection of article 15."

With regard to the rest of the information requested (identifying data of the users, data of the property - estate, surface area and plot - and water use rights), for the purposes of weighting mentioned, it must be taken into consideration that the file sent does not state that the person making the claim is a member or part of the Community of Irrigators (...).

This circumstance, if concurred, could justify a differentiated treatment with regard to the possibility of accessing certain personal information of the user register, as would be the case of the identity of the rest of the members, or the data directly linked to the 'use (property data - estate, surface area and plot - and water use rights). As an example, the Superior Court of Justice of Catalonia has recognized this in STSJC no. 229/2003, of February 13 or in the STSJC no. 697/2015, of November 13, both in relation to access to the register of irrigators for electoral purposes.

But, given that it is not recorded that the applicant is a member of the Community of Irrigation, it does not seem that the access of the person claiming to the identity of the other members or information about the rights to the use or private use of the water enjoyed by each of the members of the Community, which are determined based on the surface of the land to be irrigated (article 8.1 Statutes).

The disclosure of the requested personal data can have a significant impact on the private sphere of the members of the Community of Regants, without, both from the point of view of transparency and data protection, being considered justified this interference.

For all that, the access of the person making the claim to the information contained in the user register of the Community of Irrigators is not considered justified.

conclusion

In view of the information available, the access of the person making the claim to the personal data contained in the user register of the Community of Irrigation would not be justified.

Barcelona, May 10, 2021