

IAI 32/2021

Report issued at the request of the Commission for the Guarantee of the Right of Access to Public Information in relation to the claim against a city council for the denial of access to information on the self-employed and concessionary companies that throughout the year 2020 carried out or carry out work or services for that municipality

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 town council for the denial of access to information about the self-employed and concessionary companies that throughout the year 2020 have carried out or will carry out work or services for that town council.

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 Adviser, I report the following:

Background

1. On September 18, 2020, the works committee (CCOO) and the official staff delegate (SPL-CME) of the city council jointly presented a letter to that council in which they request: "information on the self-employed and concessionary companies that throughout the year 2020 have carried out or will carry out work or services for the Excellency. city council, as well as their remuneration included in Chapter II of the Budgets."
2. On December 17, 2021, the city council responds to the request made and provides a relationship with the self-employed who in the period from January 1, 2020 to November 26, 2000 had invoiced amounts greater than 2,000 euros. With respect to these, the last three numbers and the letter of the DNI, the initials, the invoiced amount and the concept are provided. Regarding companies, a list is provided with the object of the contract and the billing in the same time period.
3. On January 25, 2021, the city council's business committee presents an instance to the city council in which it requests: "an update on 12/31/2021, with information on the freelancers and concessionary companies that throughout 2020 have carried out or will carry out work or services for His Excellency. City Council, as well as their remuneration included in Chapter II of the Budgets."
4. On April 8, 2021, the representative of the works committee files a claim with the GAIP against the city council in which he claims the following information: "Information about the self-employed and concessionary companies that throughout the year 2020 have performed or are performing work or services for the city council, as well as their remuneration according to Chapter II of the Budgets, updated on 12/31/2020"

5. On April 12, 2021, the GAIP requests the city council to issue a report on the claim submitted, identify the third parties affected by the access and send the completed file to which it refers.

6. On March 16, 2021, the city council issues a report in relation to the claim presented in which it states that on April 14, 2021, that Corporation had transferred to the Company Committee the information only tendered for the whole year 2020.

7. On April 26, 2021, the GAIP addresses the request for a report to this Authority in accordance with the provisions of article 42.8 of Law 19/2014, of December 29, on transparency, access to public information and good governance.

Legal Foundations

I

In accordance with article 1 of Law 32/2010, of October 1, of the Catalan Data Protection Authority, the APDCAT is the independent body whose purpose is to guarantee, in the field of the competences of the Generalitat, the rights to the protection of personal data and access to the information linked to it.

Article 42.8 of Law 19/2014, of December 29, on transparency, access to public information and good governance, which regulates the claim against resolutions on access to public information, establishes that if the refusal has been based on the protection of personal data, the Commission must issue a report to the Catalan Data Protection Authority, which must be issued within fifteen days.

For this reason, this report is issued exclusively with regard to the assessment of the incidence that the requested access may have with respect to the personal information of the persons affected, understood as any information about an identified or identifiable natural person, directly or indirectly, in particular through an identifier, such as a name, an identification number, location data, an online identifier or one or more elements of physical, physiological, genetic, psychological, economic, cultural or social 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

According to the documentation contained in the file, the claimant requests access to the information updated on December 31, 2020 about the self-employed and concessionary companies (we understand that it refers to contractor companies, in general) that throughout the year 2020 they had carried out work or services for the city council and their remuneration. Likewise, the letter of request mentions that the staff attached to the town hall through freelancers and contractor companies, as well as their remuneration, are unknown.

Regulation (EU) 2016/679 of the European Parliament and of the Council, of April 27, relating to the protection of natural persons with regard to the processing of personal data (hereinafter, RGPD), defines personal data as "all information about an identified or identifiable natural person ("the interested party"); Any person whose identity can be determined, directly or indirectly, in particular by means of an identifier, such as a number, an identification number, location data, an online identifier or one or more elements of identity, shall be considered an identifiable physical person physical, physiological, genetic, psychological, economic, cultural or social of said person;"(article 4.1 RGPD).

The RGPD extends its protection to the processing of personal data on an identified or identifiable natural person, therefore, the data of legal entities are excluded from this scope of protection. Consequently, there must be no inconvenience from the perspective of data protection regulations in providing the interested party with information referring to the contractor companies that have carried out work or services for the city council during the claimed period.

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

According to article 4.2 of the RGPD "consultation, use, communication by transmission, dissemination or any other form of enabling access, access or interconnection, limitation, deletion or destruction" are data treatments personal data subject to the principles and guarantees of the RGPD.

The RGPD provides that all processing of personal data must be lawful, loyal and transparent in relation to the interested party (Article 5.1.a) and, in this sense, establishes a system of legitimizing the processing of data which is based on the need for one of the legal bases established in its article 6.1 to apply. Specifically, sections c) and e) of article 6.1 of the RGPD provide respectively, that the treatment will be lawful if "it is necessary for the fulfillment of a legal obligation applicable to the person responsible for the treatment", or if "it is necessary

fulfillment of a mission carried out in the public interest or in the exercise of public powers conferred on the person responsible for the treatment”.

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

At the same time, article 86 of the RGPD provides that "The personal data of official documents in the possession of any public authority or public body or a private entity for the performance of a mission in the public interest may be communicated by said authority, body or entity in accordance with the Law of the Union or of the Member States that 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 (LTC hereinafter) aims, among others, to "regulate and guarantee people's right of access to public information and documentation" (art. 1.1.b).

Specifically, article 18 of the LTC establishes that "people have the right to access public information, referred to in article 2.b, individually or in the name and representation of any legal entity legally constituted" (section 1). The mentioned article 2.b) defines "public information" as "the information prepared by the Administration and that which it has in its power as a result of its activity or the exercise of its functions, including the which are supplied by the other obliged subjects in accordance with the provisions of this law”.

The information that is the subject of the claim presented by the representative of the city council's business committee is "public information" for the purposes of the LTC and remains subject to the access regime provided for in these regulations.

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".

The claimant states in the letter of claim that he is acting in his capacity as president of the city council's business committee. Therefore, it will be necessary to take into account the provisions that specifically regulate the access of workers' representatives to certain information necessary for the exercise of their functions, fundamentally, Royal Legislative Decree 2/2015, of 23 October, by which the revised text of the Workers' Statute Law is approved.

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 up to him to carry out the tasks,

among others, "monitoring compliance with current labor, Social Security and employment regulations, as well as the rest of the agreements, conditions and company usages in force, and formulating, where appropriate, 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 representatives about certain topics provided for in the regulations that, directly or indirectly, have or may have an impact on labor relations." (art. 64.7.e) ET).

In relation to these tasks, article 64.1 of the ET recognizes the works committee "the right to be informed and consulted by the employer on issues that may affect the workers, as well as on the situation of the company and the evolution of employment in the company, in the terms provided for in this article". The specific issues on which it is recognized that the works committee has the right to be informed are collected in points 2 to 5 of article 64 the ET, among these, for the purposes of this report, it must be informed "about the situation and structure of employment in the company or work center, as well as being informed quarterly about its likely evolution, including consultation when changes are anticipated in this regard. Likewise, he has the right to be informed and consulted about all the company's decisions that may cause relevant changes regarding the organization of work and employment contracts in the company. He also has the right to be informed and consulted on the adoption of any preventive measures, especially in case of risk to employment".

In the case we are dealing with, the documentation that makes up the file shows that the representative of the workers requests, on the one hand, information on the self-employed and contractor companies that had carried out work or services throughout the year 2020 for the town council and its remuneration charged to chapter II, that is to say information relating to their recruitment; and, on the other hand, information on the workers (self-employed or workers of contractor companies) who provide their services to the municipal departments and their remuneration.

With regard to the contractual information mentioned, there is no specific provision in the analyzed regulations that enables the works committee to access it, so this access will have to be analyzed applying the transparency regulations.

With regard to the information on the self-employed and workers of contractor companies that provide their services in the municipal offices, it would be linked to the functions that article 64 of the ET attributes to the works committee in relation to the issues that may affect workers and, in particular, with the right to be informed and consulted about all the company's decisions that have an impact on the situation and structure of employment in the company or that may cause relevant changes it concerns the organization of work, which provides for the aforementioned article 64.5 of the ET.

In accordance with article 64.6 ET "The employer must provide the information to the works council, without prejudice to what is specifically established in each case, at a time, in a way and with appropriate content, that allow the workers' representatives to examine it properly and prepare, if necessary, the consultation and the report."

In this case, for the determination of the specific information to which the claimant could be given access, it is necessary to apply the principle of data minimization provided for in Article 5.1.c) RGPD, according to which the representative of the company committee it should access the minimum

for the development of the functions assigned to it. In this sense, for the exercise of its functions, it seems that it would be sufficient to know whether the city council has made contracts involving the assignment of external personnel to the municipal departments, the number of people in this situation, the departments in the which have been attached and their professional classification. However, the claimant also requests to know the remuneration received by these people. It does not appear that the specific regulations analyzed enable access to this specific information and, therefore, additionally, in accordance with the first additional provision of the LTC, this issue will need to be analyzed in accordance with the transparency re

IV

First of all, the access to information on the self-employed and contractor companies that throughout 2020 had carried out work or services for the city council and their remuneration charged to chapter II, based on the regime, is analyzed of the right of access to public information provided for in the transparency legislation.

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 principle, it can be ruled out that this information contains data deserving of special protection in the terms provided for in article 23 LTC, in which case it would be necessary to preserve its confidentiality and limit access, unless with the request the express consent of the affected persons was provided.

Access to the rest of the personal data contained in the requested information requires a prior weighting between the different rights and interests at stake in accordance with the provisions of article 24.2 LTC:

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

a) The elapsed time. b)

The purpose of the access, especially if it has a historical, statistical or scientific purpose, and the guarantees offered. c) The fact that it is data relating to minors. d) The fact that it may affect the safety of people."

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 being subject to the motivation or invocation of any rule, knowing the motivation of the application may be a relevant element to take into account.

In the case at hand, the claimant makes his request as president of the company committee and states that he is relying on article 64 of the Workers' Statute (ET) to access the requested information .

As has been explained, although article 64 ET establishes that the works committee has "the right to be informed and consulted by the employer on issues that may affect the workers, as well as on the situation of the company and the evolution of employment in the company, in the terms provided for in this article ", among the information provisions of this article there is no specific authorization that allows the works council to access the information regarding municipal procurement. Therefore, although, as we have seen, the provisions of the specific access regime would not imply an authorization to access these required personal data, the status of member of the company committee of the claimant must be taken into consideration in the weigh

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 other words, to establish the possibility of offering tools to citizens to control the performance of public authorities.

In matters of administrative contracting, article 13.1. of the LTC obliges the Administration to publish, among others, "d) The contracts signed, with the indication of the object, the tender and award amount, the procedure used to contract and the the identity of the successful tenderer, the duration, the number of tenderers, the award criteria, the comparative table of offers and the respective scores, and also the agreements and technical reports of the procurement process. This information must be up-to-date and refer to at least the last five years".

In accordance with the aforementioned articles, to the extent that the information on the contracts signed with an indication of the object, the amount and the identity of the successful bidder, among others, is information that the city council must public not only by application of the transparency regulations but also by the public sector's own procurement regulations, it does not seem that the data protection regulations can prevent access to the requesting person being facilitated to the requested information regarding to the identification of the contractors who have carried out work or provided services for the city council during the year 2020 and the amounts or remuneration they have received for the execution of the corresponding contracts during th

With regard to the identification information of the successful tenderer (when this is a natural person) that can be provided to the claimant, it must be taken into consideration that, in accordance with the principle of data minimization provided for in article 5.1.c) RGPD, the data must be adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed. Thus, what becomes essential in terms of transparency is the identification of the awardees - even the other bidders - of a public contract, given that otherwise it would not be possible to carry out effective control of the awarding process of the contract and the management of public resources. In this sense, the communication of the data of the ID number, NIF or equivalent identification document of the affected persons, would be unnecessary and, therefore, contrary to the principle of minimization. And this because providing this data to the person making the claim for the purposes of monitoring the municipal action doe

awardees of the contracts carried out by the city council. On the contrary, it can lead to serious damage for the people affected, in case of subsequent misuse of this data by third parties.

It must be taken into consideration that the purpose of transparency is achieved in a more efficient way with the knowledge of the name and surname of the successful tenderer. Remember that the LOPDGDD establishes, with regard to the identification of interested parties through announcements and in the publication of administrative acts "In no case should the name and surname be published together with the full number of the national identity document, foreigner's identity number, passport or equivalent document" (seventh additional provision). This could lead to the fact that if there is a coincidence of names and surnames, the awardees can be distinguished through the four digits of the DNI number following the criteria that, provisionally until the rules for the deployment of the aforementioned additional provision are approved, have been jointly approved by the data protection au

Therefore, the identification of the self-employed and individual entrepreneurs who carry out work for the city council must be done with the indication of their first and last name, without including the full ID number.

v

In accordance with what has been set out in the basis III of this report, the specific regime of access for the works committee can justify access to information on whether the city council has made contracts that involve the assignment of external staff to municipal departments, the number of people in this situation, the departments to which they have been assigned and their professional classification. However, beyond that, and with regard to the information requested, with respect to the remuneration received by these people, it will be necessary to analyze it in accordance with the regime of access to public information provided for in the regulations

With respect to this information, article 24.2 will apply, according to which it will be necessary to make a prior, reasoned weighting between the public interest in the disclosure and the right of the affected persons, taking 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, based on the different elements listed in the aforementioned article.

One of the criteria to be taken into account in this weighting is the purpose of the access, which as has been explained, the claimant bases it on the exercise of his functions as president of the company committee.

As we have seen, by application of article 13.1. of the LTC and the procurement regulations, the city council must make public, among others, the information on the object, the amount and the identity of the contract awardee. Therefore, in the case of freelancers hired by the city council who provide services in municipal offices, there should be no impediment to providing the workers' representative with the names and surnames of the freelancers hired by the city council who provide services in the municipal departments, as well as the amount of the tender which, in this case, will coincide with their remuneration.

With regard to the workers of the companies contracted by the city council who are assigned to carry out work in the municipal offices, it must be taken into consideration that article 9.1.h) of LTC establishes the obligation to publish "the list of positions occupied by personnel assigned by the awardees of contracts signed with the Administration that, by virtue of the contract, carry out an activity, a service or a work of a permanent nature in an outbuilding or a public establishment, and also the system of dedication and the remuneration system of this staff and the tasks it carries out". This article has been developed by Decree 8/2021, of February 9, on transparency and the right of access to public information (RLTC), in article 43.9 which imposes on the awardees to provide the body of recruitment the following information:

"For the purposes of letter h) of article 9.1 of Law 19/2014, of December 29, the persons awarded contracts for services that must be provided in the premises of the contracting entity must provide to the contracting body, in accordance with the format that it establishes, an anonymized list of the jobs held and the professional classification of the personnel that the person awarded the contract assigns to the execution of the contract.

These personnel are in no case considered personnel in the service of the contracting entity nor can they occupy jobs thereof, so they maintain the employment link with the person awarded the contract or, where appropriate, with the subcontracted entity".

Therefore, the transparency regulations oblige to make public the anonymized relations of the positions occupied by staff assigned by the awardees of contracts signed with the Administration that, by virtue of the contract, carry out an activity, a service or a work of a permanent nature in an outbuilding or a public establishment, and also the employment regime and the remunerative regime of this staff and the tasks they carry out.

Knowing the cost represented for the municipal administration by the provision of services by these people in the municipal offices, seems justified as a guarantee of the retention of accounts and of the responsibility in public management that pursues the transparency regulations (article 1.2 LTC). And, very likely, to the extent that at the time of the award of the contract the amount of this is based on the amount of the hours of services provided or the workers assigned, this information may be included in the contractual information that the city council must make public, both in its profile of the contractor (the evaluation report of the quantifiable award criteria by means of a value judgment of each of the offers, article 63 of the LCSP), as in the transparency portal (the comparison table LTC offers and the

However, in line with these provisions regarding active advertising, the identification of the persons assigned to provide services to the city council seems unnecessary for the performance of the functions that correspond to the works committee in accordance with the provision

In any case, the disclosure of certain information relating to the remuneration system of these people could entail a risk of economic profiling. Likewise, from the point of view of the privacy of these people, it must be taken into account that they provide their services in a private company, which are unrelated to the employer's decision to assign them to a specific project or service, and who do not have an expectation, due to their employment relationship, that their data will be communicated to a third party.

It should also be added that, in the specific case at hand, it cannot be ruled out that, as it is a town hall with a relatively small staff, the identity of the persons assigned by the awardees of contracts signed with the town hall which, in by virtue of the contract, carries out an activity, a service or a work of a permanent nature in the municipal offices is already known to the claimant. Delivering the requested information may entail a risk of re-identification, but taking into account the elements set out, it seems that the weighting should be decided in favor of the exercise of the right of access.

In short, in the case at hand, in accordance with the considerations made and, to the extent that the request refers to the number of people who are in this situation and not to their specific identification, and that the regime remuneration of the same must be published by the city council on its transparency portal, it does not seem that the claimant's access to the requested information can be limited.

Conclusions

The data protection regulations do not prevent access to the claimed information about the freelancers and contractor companies that throughout 2020 have carried out work or services for the claimed council, as well as their remuneration charged to the Chapter II of the Budgets. However, the identification data of the self-employed and individual entrepreneurs must be limited to their first and last name.

Nor would the data protection regulations prevent access to the first and last names and the amount of the tender of the freelancers hired by the city council who provide services in its departments, nor to the anonymized list of workers that the contractor companies have assigned to the provision of services in the municipal offices as well as the remuneration system for this staff.

Barcelona, May 18, 2021