

IAI 33/2021

**Legal report issued at the request of the Commission for the Guarantee of the Right of Access to Information Public in relation to the claim against the denial of a local public business entity to the request for access to information related to municipal promotions**

**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 denial of a local public business entity, of housing management, to the request for access to information relating to municipal promotions.**

Having analyzed the request, which is accompanied by a copy of the file of the claim presented, in accordance with the report of the Legal Counsel, the following is reported.

#### **Background**

1. On February 17, 2021, a request is submitted addressed to a local public business entity, for housing management, in which it states that this "[...] has established different surface rights on homes in in favor of individuals with the purpose of making them their usual and permanent address. Law 18/2007, of December 28, on the right to housing only provides for this tenure regime for homes with official protection; from the content of the different Housing Plans [...] and Municipal Action Plans it can be inferred that the application of this regime, as a formula for ownership and use of housing, was planned for the new municipal promotions [...], and on qualified land."

In relation to this, he requests to know the reasons why "[...] this tenure regime is applied to pre-existing developments and not located on land qualified as protected", in addition to the "motivation for which "offers the tenants of the promotions [...], the possibility of acquiring a surface right on the housing, and not to the tenants of the other promotions."

It also requests the "Detail by location of the promotions of the surface rights granted in favor of workers (current or past) of [...]."

2. On March 31, 2021, the entity sends an email to the applicant in which it communicates information related to the explanations requested and, in relation to the details of the location of the promotions of surface rights granted in favor of employees of the entity, states the following:

"[...], does not have any processing of the requested data, but in the case of any processing of personal data, and under the LOPD it would not be possible to provide said data, since the processing of data of identified or identifiable natural persons, can only be transferred for the purposes that each treatment contemplates and, only to the organs or entities determined in each treatment."

On the same date, the applicant sends an email in which he expresses his disagreement with the information transferred and reiterates his request.

3. On April 12, 2021, the applicant submits a complaint to the GAIP in which he reiterates his request and states that the entity's response does not correspond to the issues raised and, in relation to the information relating to the details of the location of the promotions of the surface rights granted in favor of employees of the entity, he states that he is only asking for the location of the promotion and not the specific housing.

4. On April 14, 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 26, 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

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".

In accordance with the provisions of recital 26, "[...] To determine whether a natural person is identifiable, all means, such as identification, that can reasonably be used by the person responsible for the treatment or any other person must be taken into account to identify directly or indirectly the natural person. To determine whether there is a reasonable probability that means will be used to identify a natural person, all objective factors must be taken into account, such as the costs and time required for identification, taking into account both the technology available at the time of the treatment as technological advances".

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 claimant has requested to know the reasons why the entity has granted the tenure regime relating to the surface right in pre-existing developments, and not located on land qualified as protected; because agreements have been offered to acquire a surface right on housing to tenants of certain promotions, and not in others, as well as knowing in detail, by location, the housing promotions in which the right has been granted of surface to workers, active or not, of the entity.

In relation to this last question, the person making the claim specified in his claim that he is only interested in knowing the location of the development, not the homes affected.

Regarding the first two questions requested (reasons why this tenure regime applies to pre-existing developments and not located on land qualified as protected, as well as the motivation for which it is offered to the tenants of certain developments the possibility of acquiring a surface right, and not in other promotions), it does not appear that the delivery of the information involves the delivery of personal information in the terms provided for in the RGPD. For this reason, and to the extent that the identification of a promotion through the neighborhood or area where the promotions are located does not allow the identification of specific owners, and also that the information requested does not affect the analysis of the conditions that meet each of the awardees but only the knowledge of the reasons for which this regime has been chosen in these areas, from the point of view of data protection regulations a priori there would be no impediment to providing the requested information.

However, and with regard to the third end requested, communicate the location of the housing developments in which the surface right has been granted to workers, active or not, of the entity, if may have implications for the protection of personal data in certain cases.

There may be cases in which communicating the location of housing developments in which the right of surface has been granted to workers, active or not, of the entity may involve making public information about the fact that a certain person is an employee of the entity. It is clear that the possibility of identifying natural persons will depend on the circumstances that arise in each specific case, and in this sense, this possibility can be increased if, for example, all, or almost all, the awardees of a certain promotion they are employees of the entity (in an area where it is the only promotion of this nature).

In the case at hand, based on the information contained in the file sent, it is not possible to determine with certainty the possibility that personal data will be affected, but to the extent that there is a reasonable probability of identification, the protection regulations of data is applicable and, consequently, it is necessary to analyze the request formulated from this perspective. In any case, the report will focus on this one aspect: access to the location of the housing developments in which the surface right has been granted to workers, active or not, of the

It should be noted that the entity has stated, in the email dated March 31, 2021, not to carry out any treatment on the data of its employees in the sense requested by the person making the claim. This could be so, in the event that there was no promotion in which the right of surface was granted to workers of the Institute. In this case, it would be sufficient for the Institute to indicate this circumstance without referring to any personal data. However, it should be borne in mind that this same email is expressed in a contradictory way, because after stating that it does not do any treatment, it states that if it did do the treatment, the information would have to be denied for reasons of protection of personal data. It does not seem that it can be ruled out, then, that there is some assumption of awarding to workers. And in this case it is clear that data processing in the sense expressed would be taking place.

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 we are dealing with, for the purposes that interest us in this report, in which it is requested to know information relating to the locations of the promotions in which the right of surface has been granted to workers, active or not, of the entity, this information must be considered public in accordance with article 2.b) of the LTC and subject to the right of access (article 18 of the LTC), as it is information in its possession at consequence of their competences. However, the right of access to public information is not absolute and can be denied or restricted for the reasons expressly established in the laws, as is the case of the limits of articles 23 and 24 of the LTC regarding the personal data.

### III

At the outset, access to information relating to the location of developments in which workers of the entity, whether active or not, have been awarded surface rights, must be analyzed from the point of view of article 24 of the LTC, by discarding the application of article 23 of the LTC, since the information requested, a priori, should not include data relating to ideology, affiliation trade union membership, religion, beliefs, racial origin, health and sex life, or relating to the commission of criminal or administrative offenses that do not involve public reprimanding of the offender.

Article 24 of the LTC 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.

3. Requests for access to public information that refer only to the applicant's personal data must be resolved in accordance with the regulation of the right of access established by the data protection legislation staff."

In accordance with this article, the possibility of knowing the location of the promotions in which surface rights have been awarded to employees of the entity must go through a prior reasoned weighting between the public interest in disclosure and the right to data protection 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 determining whether the claimant's right of access or the data protection right of the affected persons should prevail, taking as based on the different elements listed in the aforementioned article.

One of the circumstances that must be taken into account is the purpose of the access (art. 24.2.b) LTC). In this sense, although article 18.2 of the LTC provides that the exercise of the right of access is not conditional on the concurrence of a personal interest, and does not remain subject to motivation or require the invocation of any rule, knowing the motivation for which the person making the claim wants to obtain the information can be a relevant element to take into account.

In the case we are dealing with, as can be deduced from the writings contained in the file sent, the purpose claimed by the person making the claim is to access this information with the aim of controlling the management carried out by the entity on the awarding of the surface right, from the point of view of knowing the criteria on which their decisions are based, such as why that right is awarded in some developments and not in others, or to know to what extent workers can benefit from these awards.

It should be borne in mind that the purpose pursued by the transparency regulations is "to establish a system of relations between people and the public administration and other obliged subjects, based on 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 public management" (article 1.2 LTC), or in other terms, establish the possibility of offering tools to citizens for the control of the performance of the public authorities.

To this end, it is clear that knowing the criteria that govern the entity's performance in the management of surface rights in its promotions allows you to control its performance from the point of view of verifying that the awarding procedures are have carried out in accordance with the principles emanating from the public sector regulations (equality, non-discrimination, transparency and

proportionality...). Even so, and taking into account that the claimant remains interested, especially, in knowing the locations of the developments in which surface rights have been awarded to employees of the entity, it would also seem that the transparency regulations would support the desire to know the resources that the public administration makes available to its workers and under what conditions.

It should also be borne in mind that, pursuant to the provisions of article 11.2.b) of the LTC, the entity must make public the financial information relating to the management of the assets.

In this sense, letters b) and d) of article 48.2 of Decree 8/2021, of February 9, on transparency and the right of access to public information (RLTC), establish that the information that must be published on wealth management includes, but is not limited to:

"b) The economic information relating to the management of the heritage of heritage assets, which must specify a description of the approved exploitation system, or indicate whether it is pending exploitation, and a description of the content of the operations and procedures of alienation, exchange, assignment or lease to third parties, if applicable, in such a way as to identify at least the subjects involved in the operation, the agreed consideration, if applicable, the date of the operation and community expenses or other expenses that may accrue and be satisfied due to other concepts.

c) Information on property procurement, which includes the creation and termination of legal businesses related to lucrative and onerous acquisitions, leases and renewals, alienations, transfers to third parties and termination of existing legal businesses, and pending legal businesses related to ongoing contests and auctions, among others."

Obviously, accessing this information may affect the right to the protection of the personal data of workers who may be affected by the access request made, which may affect their professional and patrimonial sphere.

In relation to the professional sphere, knowing that a person is an employee of the IHMAB, even if he discloses work information, should not a priori have a special relevance that would make the claimant's right of access to public information lapse. In this sense, it should be borne in mind that the entity is subject to the active advertising regime and, in particular, must make public the calls for proposals and the results of the selective processes for the provision and promotion of personnel (art. 9.1.e) of the LTC).

From the point of view of the patrimonial sphere, in this case a greater level of interference in the protection of the data of the affected workers is appreciated, to the extent that it can reveal aspects about the housing regime where the person has his habitual residence, on the conditions to which he is subjected, or on the period for which he enjoys the right of surface. However, it must be noted that the transparency regulations contain provisions regarding the advertising of asset management and, specifically, on legal business related to asset management, as we have seen, therefore, the expectations of privacy that the affected workers may have, from this point of view, must already incorporate the limitations derived from this regulation.

**For this reason, and given that there are no specific circumstances from which to consider that the right to the protection of workers who may be affected by the access request should prevail, the personal data protection regulations do not prevent access the information relating to the location of the promotions in which the surface right has been awarded to employees of the entity, active or not.**

#### **conclusion**

**The data protection regulations do not prevent communicating the reasons why the entity has granted the tenure regime relating to the surface right in pre-existing developments, and not located on land qualified as protected, as well as the reasons why offered agreements to acquire a surface right on housing in some promotions, and not in others, as personal data is not affected.**

**In relation to the request for information relating to the location of the promotions in which the surface right has been awarded to workers, active or not, of the entity, the data protection regulations do not prevent access to this information in accordance with what has been ex**

**Barcelona, May 20, 2021**