

IAI 39/2021

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 a City Council's partial estimate of access to the participatory budget file by a municipal group

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 a City Council of the access to the file of participatory budgets by a municipal group.

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 December 10, 2020, an application is presented to a City Council, in which a councillor, representing a municipal group, requests access to the list of proposals made as part of the first participatory budgets 2021, in order to be able to follow up the process with accurate information.
 2. On December 14, 2020, the City Council sends a letter to the councillor indicating that once the proposals received have been evaluated, he will be called to a meeting, together with all Councilors of the City Council and prior to the session citizen prioritization deliberative, to inform them of all the proposals.
 3. On February 12, 2021, the councillor addresses a new request to the City Council in which he reiterates, in short, the terms of his request. The City Council, on February 23, 2021, replied that it plans to inform the councilors of the proposals received, as well as the technical result on the accepted and rejected proposals, in a meeting called on February 25, 2021.
 4. On April 10, 2021, the councillor sends a new request to the City Council in which he states that "[...] in neither of the two meetings was access to the entirety of the "file of the participation process" and requests "access to the entire file related to the first participatory budget carried out in [...] in paper format or in digital format, preferably in a PDF document".
- On April 14, 2021, the City Council responded to the request informing that this information "was already provided to you on February 26, 2021".
5. On May 10, 2021, the councillor presents a claim to the GAIP in which he states that although the City Council has provided him with a "list of properly ordered and classified proposals (valid, discarded and already planned)", this is the only information available

transmitted in relation to the file of this process. To this end, it demands access to the entire file, including the original proposals received in the public participation process.

6. On May 13, 2021, the GAIP will send the claim to the City Council, asking for a report setting out the factual background and the basis for its position in relation to the claim, as well as the complete file and, if applicable, specifying the third parties affected by the claimed access.

7. On May 27, 2021, the City Council sent a legal report to the GAIP in which it states that it delivered to the councilor, on February 26, 2021, the proposals with budget forecasts to carry out or that have already been executed, discarded proposals and the reasons, as well as valid proposals. This documentation is attached to the report.

At the same time, he states that "in accordance with what is established in articles 77 LBRL, 164 TRLLMRLC and 30 ROM, this documentation allows the councilor to carry out his duties properly since it contains all the information of the proposals presented as part of the participatory budgeting process 2021, with the exception of the names and surnames of the people presenting the proposal, given that this is irrelevant data in this process".

8. On May 21, 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 information public and good government.

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 repeals Directive 95/46/CE (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

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".

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, 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 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).

For its part, 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, with supplementary character, by this law".

In the case at hand, the claimant holds the status of a councillor, acting on behalf of a municipal group, which means that the provisions established by the local regime legislation, fundamentally, Law 7/ 1985, of April 2, regulating the bases of the local regime (LRBRL) and Legislative Decree 2/2003, of April 28, which approves the revised text of the Municipal and Local Government Law of Catalonia (TRLMRLC), regarding councillors' access to municipal information.

This without prejudice to the fact that the complaining councillor must be granted at least the same guarantees in terms of access to information - including the possibility of lodging a claim with the GAIP - as the rest of the citizens who do not have this condition of elected position, given the supplementary application of the LTC (DA1a. section 2).

III

At the outset, it should be noted that this Authority has previously had the opportunity to analyze the councillors' right of access to the information available to their corporation, necessary for the exercise of the functions that correspond to them (among others, in the opinions CNS 10/2017, CNS 29/2018 or CNS 2/2021 as well as in the reports IAI 48/2019, IAI 52/2019 or IAI 27/2021 available on the website <https://apdcat.gencat.cat>).

In accordance with the provisions of article 77.1 of the LRBRL, all members of local corporations have the right to obtain from the mayor or president or from the government commission all the antecedents, data or information that are in the possession of the services of the corporation and are necessary for the development of its function.

For its part, article 164 of the TRLMRLC provides for the following:

"164.1 All members of local corporations have the right to obtain from the mayor or mayoress or the president, or from the governing commission, all the background, data or information that is in the possession of the corporation's services and are necessary for the development of their function.

164.2 Corporation services must provide information directly to corporation members when:

a) Exercise delegated functions and the information refers to matters of their own responsibility. b) These are matters included in the agenda of the sessions of the collegiate bodies of which they are members. c) It is about access to information or documentation of the local corporation that is freely accessible to citizens.

164.3 In the other cases, the request for information is understood as accepted by administrative silence if a negative resolution is not issued within four days from the date of presentation of the request. In any case, the negative decision must be motivated, and can only be based on the following assumptions:

a) When the knowledge or dissemination of the information may violate the constitutional right to honor, personal or family privacy or one's image. b) When it comes to matters affected by the general legislation on official secrets or summary secrecy.

[...]

164.6 The members of the corporation must respect the confidentiality of the information to which they have access by virtue of their position if the fact of publishing it may harm the interests of the local entity or third parties."

In the same sense, the Municipal Organic Regulation of the City Council [...] regulates in similar terms the right to information of municipal councilors in article 29.d) et seq.

The right to obtain all the antecedents, data or information that are in the possession of the services of the local corporation and that are necessary to exercise their functions, in accordance with repeated jurisprudence on this issue (STS 27 of June 1988, 27 of September 2002, June 15, 2009, among others), is part of the fundamental right to political participation enshrined in Article 23.1 of the Spanish Constitution, according to which "citizens have the right to participate in the public affairs, directly or through representatives, freely elected in periodic elections by universal suffrage."

It should be borne in mind that the elected officials participate in a public action that manifests itself in a wide range of specific matters, such as the right to audit the actions of the corporation, the control, analysis, study and information of the necessary antecedents, which have the services of the City Council, for their control task and to document themselves for the purposes of adopting decisions in the future (among others, STS of March 29, 2006). In relation to this, the STS of June 27, 1998 already stated that "[...] To be able to perform this supervisory function and

controller, it is necessary to know beforehand those data and antecedents that are needed for that purpose, which implies the need to have access to all the data, antecedents and information [...] to then select those that can be useful in the fulfillment of the function entrusted to councilors [...]".

In the same way, it should be noted that the local regime legislation does not require councilors that, in order to access municipal information, they must explain or justify the purpose of their request, given that the reason for their request is 'must be understood as implicit in the exercise of their functions that correspond to them as councilors (among others, STS of November 5, 1999).

However, it should be borne in mind that the regulations set out provide that although the right of access of the members of the local corporations operates on all the background, data and information that are in the possession of the services of the corporation, these must be necessary for to the development of its function.

On the other hand, it should also be borne in mind that the councilors' right to information is not an absolute right. For this reason, if it conflicts with other rights, it is necessary to weigh the different rights at stake, in order to decide which should prevail and to what extent.

This has come to be recognized by the local regime legislation itself. The aforementioned article 164 of the TRLMRLC, in regulating the conditions for the exercise of the right of access to municipal information by the members of the corporations (sections 2 and 3), establishes, as a possible basis for denying the request with reasons 'information, that "the knowledge or dissemination of the information could violate the constitutional right to honor, personal or family privacy or one's own image" (section 3, letter a), but obviously access could also be denied- se when other fundamental rights may be affected such as the right to the protection of personal da

In the case at hand, the City Council states that the documentation it provided on February 26, 2021 to the councilor (proposals received with budget forecast to be carried out or already executed, rejected proposals and the reasons and proposals valid) "contains all the information on the proposals presented as part of the participatory process of the 2021 budgets, with the exception of the names and surnames of the people presenting the proposal, given that this is irrelevant data in this process".

Since the exercise of the councilor's right of access, which aims to access the entire file of participatory budgets, including the original proposals, could lead to a limitation of the fundamental right to the protection of personal data, it will be necessary determine whether it is a proportional limitation, since, according to repeated doctrine of the Constitutional Court, the limitation of fundamental rights can only occur in a proportional way (SSTC 11/1981, 57/1994, 66/1995, 11/2006, 206/2007, among others).

It is therefore necessary to examine the circumstances in the particular case taking into account the intended purpose, whether this information is necessary to achieve said purpose, the possible people affected and whether it requires special protection.

The councilor has requested the City Council to access all the documentation relating to participatory budgets. As the councilor points out, the City Council has provided him with some of the information that would correspond to the screening of the proposals presented by citizens, but has not communicated the entirety of the participatory budget file, in particular the copy of the proposals originals, including the identification of the people who submitted

The analysis of the circumstances in the particular case must be based on the provisions of article 18 of the LRBRL (and, in similar terms, article 43 of the TRLMRLC) which includes the rights of neighbors, among others, to participation in municipal management, in accordance with the terms provided by law.

In this sense, local corporations must guarantee the effectiveness of the rights of exposed neighbors by providing the most extensive information about their activity and the participation of all citizens in local life (art. 69.1 of the LRBRL and, in similar terms, article 154 of the TRLMRLC), at the same time that they must establish and regulate, based on organic rules, the appropriate procedures and bodies to make effective their participation in the affairs of local public life, both in the scope of the municipality as a whole as in that of the districts, in the event that these territorial divisions exist in the municipality (art. 70.bis of the L

The general legislation on administrative procedure and the legal regime of public administrations also recognizes the principle of participation under different modalities. Thus, Law 26/2010, of August 3, on the legal regime and procedure of the public administrations of Catalonia, in article 22.2 establishes that:

"2. The public administrations of Catalonia must encourage citizen participation in the administrative actions under their jurisdiction, in order to collect proposals, suggestions and initiatives from citizens, through a prior process of information and debate.

And article 31.2 of the same law includes, as a general principle of the action of the public administrations of Catalonia, citizen participation.

For its part, Law 39/2015, of October 1, on the common administrative procedure of public administrations (LPAC) also recognizes the principle of participation in the statement of reasons, and establishes that "in accordance with the in the laws, the Public Administrations may establish other forms, means and channels of participation of the people, directly or through the organizations and associations recognized by the law in the procedure in which the administrative acts are dictated" (art. 83.4) .

At the same time, the LTC also provides in article 68 that "The procedures for citizen participation and collaboration are those established, in general, by the legislation of the legal regime and administrative procedure, by the legislation of the local regime and by the regulations on citizen participation, without prejudice to those that may be established by law, with a specific nature, in relation to a certain action or political decision."

Beyond these general considerations, Law 10/2014, of September 26, on non-referendum popular consultations and other forms of citizen participation, regulates from article 40 et seq. the citizen participation processes defining- them as "[...] institutionalized actions intended to facilitate and promote the intervention of citizens in guidance

or definition of public policies" (art. 40.1), which "have the purpose of guaranteeing debate and deliberation between citizens and public institutions in order to collect the opinion of citizens regarding a specific public action in the proposal, decision, application or evaluation phases" (art. 40.2).

Among the participatory modalities regulated by Law 10/2014, it is worth highlighting article 54 on the public public audience, understood as "[...] the process of citizen participation through which individuals, entities and organizations the possibility to present and debate proposals in relation to a certain public action".

Article 46 of Law 10/2014 defines the minimum structure that citizen participation processes must have, starting with an information phase for the people who can participate; contribution of proposals; deliberation and evaluation of proposals and, finally, the evaluation and retention of accounts of the process.

For the purposes we are interested in, of these phases it is worth highlighting the proposal submission phase in which citizens "can present (their contributions and proposals) by any legally established means and also electronically, with the only requirement of identification of the person and without prejudice to the verification by the administration of the account through which you participate" (art. 48.3 Law 10/2014).

At the same time, in relation to the evaluation of the citizen participation process, article 50 of Law 10/2014 provides that:

"1. The evaluation of the results of the citizen participation process must be reflected in a final report, which must be drawn up within two months of its completion and which must contain at least:

- a) The description of the process and its phases.
- b) Quantitative and qualitative information on the participation that has taken place and the contributions that have been received.
- c) The methodology used in the citizen participation process and in the assessment phase.
- d) An overall assessment of the process and its results.

2. The final evaluation report must be made public on the institutional website of the convening administration and must be communicated to the participants.

3. The convening administration must be accountable for the public participation process. The retention of accounts implies, in any case:

- a) Make known the criteria used to assess contributions and proposals and the reasons why they have been accepted or rejected.
- b) Accredited the fulfillment of the commitments assumed as a result of the citizen participation process".

In relation to advertising, the LTC also foresees in article 9.1.I) the need to publish "The information relating to the participation channels and the participatory procedures in process, according to

with what is established in this law and the Law on non-referendum popular consultations and other forms of citizen participation, in order to disseminate them and facilitate citizen participation

In accordance with the regulations set forth, and from the point of view of data protection regulations, the file of participatory budgets to which the councilor intends to access, including the original proposals, will contain at least the identification data of the citizens who have participated and their proposal or contribution.

From here, if applicable, it is necessary to take into account the particularities of the call for the municipal participatory budgeting process, which can be consulted in the following link [...].

According to what emerges from the call, the proposals presented by the citizens had to comply with a series of conditions, among which it is worth noting that the proposed investment was of public interest and with a municipal vision, economically valuable, and they expressly excluded proposals for grants or aid to entities or groups, studies or analyses. By way of example, the City Council refers in the call to proposals such as creation or reform of municipal facilities, the acquisition of urban furniture and material goods, the improvement of public spaces (streets, signage, lighting, green areas, sewers), the acquisition and installation of technologies for public use (energy efficiency, reduction of pollution, computer equipment for equipment, etc.).

In accordance with the information contained in the call, and especially based on what is foreseen in the forms that were made available to citizens with the aim of sending their proposals, either in electronic format or on paper, the City Council would provide in the documentation to which the complaining councilor is interested in accessing, with respect to each of the proposals received, the information relating to the identification of the participant (name and surname, ID, email, telephone), the proposal (title, need that you want to solve, description of the proposal, place/s in the municipality where the proposal should be carried out) and the specification of whether this is presented individually, in a group (family, friends, etc.) or together with members of an entity (in this case the form requests to list it). It is worth saying that, according to the form, all fields are mandatory.

In relation to this, the possibility cannot be ruled out that the documentation to which the councilor intends to access (specifically, the original proposals), may also be affected by other categories of personal data, including special categories, especially if the participating citizen has referred to personal circumstances that may justify the meaning of his proposal (such as proposing the removal of architectural barriers in different places in the municipality with reference to his personal or family situation, or referring to the usual address for contextualize the need for the proposed proposal, or a certain sport that is practiced to defend the need for certain facilities, etc.).

Also, to the extent that the form requires the citizen to identify the entity on whose behalf he is submitting the proposal, or together with other members, in these cases other categories of personal data could also be affected, such as whether of that proposal may reveal some aspect related to your political ideology, religion, trade union activity, health or sex life (for example, in cases where the proposal has been submitted on behalf of or together with members of a religious association, a political party, etc.).

To this end, reference must be made to the provisions of Article 9 of the RGPD, which grants special protection to personal data that reveal, among others, ethnic or racial origin, political opinions, religious convictions or philosophical or trade union affiliation, data relating to the health or sexual orientation of a natural person.

Based on everything that has been set out in relation to the minimum content of the file relating to the participatory budgets organized by the City Council, as well as the rest of the information that may possibly be affected by the intended access, from from the point of view of the data protection regulations, it means that in general the claim of access to this documentation by the general public should fall in favor of the data protection of the affected persons, essentially because it would be necessary consider that the purpose of control over the action of the local corporation could be exercised without the need to know the identifying data, or that make identifiable the citizens who participate in the participation process, and if applicable other people, since it is necessary remember that the purpose of the transparency regulations is to establish the possibility of offering tools to citizens for the control of the actions of the public authorities, and not for the control bre the natural persons who relate to it, by virtue of what is provided for in article 1.2 of the LTC. This without prejudice to the fact that in these cases it may be advisable to offer the participants the possibility to decide - for example by means of a box in the forms - whether they want

Despite this, in the case at hand, taking into account that the person making the claim holds the status of a councillor, the analysis on access must be done in other terms, especially due to the fact that the matter on which the 'file to which you intend to access is related to the approval procedure of the municipal budgets.

In budgetary matters, it is the responsibility of the corporation's Plenary, made up of all the councilors, to approve the budget and its modifications in accordance with the provisions of article 22.2.f) of the LBRL (and in similar terms, article 52.2.f) of the TRLMLC). The preparation and approval procedure is contained in articles 168 and 169 of Royal Legislative Decree 2/2004, of March 5, which approves the revised text of the Law regulating local finances, of which it is necessary to highlight the necessary transfer to the Plenary of the initial budgets, together with the report of the intervention and with the annexes and complementary documentation, for approval prior to publication and subsequent final approval.

At the same time, article 98.b) of the TRLMRLC generally provides that, for the purposes we are interested in, the full documentation of the matters included in the agenda that must serve as the basis for the Plenary debate and, if In this case, the vote must be available to the councilors in the corporation's secretariat before the dispatch of the call.

From the point of view of the right to information of members of local corporations, and in particular from what is provided for in article 164.2 of the TRLMRLC, it must be remembered that local corporations must provide information directly to their members when, among others , this refers to matters specific to their responsibility (section a) or when it comes to matters included in the agenda of the sessions of the collegiate bodies of which they are members (se

Taken to the case at hand, the documentation that includes the file of the municipal participatory budgets must be considered as part of the documentation that the regulations relating to local finances establish that must be transferred to the Plenum of the local corporation with

the purpose of approving budgets. For this reason, to the extent that this information is part of the information that must serve as a basis for debate and approval in the Plenary, access to a councilor who is part of this body cannot be limited.

On the other hand, from the point of view of citizens who have participated in the participatory budgeting process organized by the City Council, they may have the expectation that their data will be treated confidentially, but it does not seem that this expectation can be extended to the extent that the body responsible for approving the budget cannot access its full content.

If the City Council, as a measure that can contribute to increasing participation, wants to guarantee the confidentiality of the people who formulate the proposals, then it should allow the people who present them to do so anonymously. But this does not seem to be the case we are dealing with, given that, from the information available, it seems that the identification of the people formulating the proposals was mandatory.

In short, to the extent that the regulations provide for the necessary participation of the councilors, as integral members of the Plenary, in the approval and modification of the budgets, and in relation to this, the obligation of the corporation to transfer them in character prior to the holding of the session all the documentation that should serve as a basis for the debate and voting in the Plenary, it would not be justified to limit the councilor's right of access in favor of the data protection of the affected persons.

v

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

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

Likewise, in accordance with the principle of purpose limitation (Article 5.1.b) RGPD), any use of personal information after access by councilors should also be based on a legitimate purpose. Otherwise, we could be faced with a treatment not adjusted to the RGPD, even though the access to personal data was initially considered legitimate.

In addition, this purpose in which the subsequent processing of personal data by councilors could be framed should not be incompatible with that which at the time would have justified the access, that is the exercise of the legally attributed functions .

For its part, in accordance with the principle of integrity and confidentiality (Article 5.1.f)) RGPD "personal data will be treated in such a way as to guarantee adequate security of the

personal data, including the protection against unauthorized or illegal treatment and against its loss, destruction or accidental damage, through the application of appropriate technical or organizational measures.”

conclusion

Given the regulations applicable in the case at hand, and from the point of view of data protection regulations, it would be justified for the councilor to access the file relating to participatory budgets, including the original proposals with identification of the people who made them.

Barcelona, June 17, 2021

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