

IAI 44/2021

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 presented by a representative of the workers against a City Council for the lack of response to the request for access to information on the relationship of the people affected by the agreement to absorb the specific productivity supplement and the exact amounts that this agreement has meant for each of the workers.

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 a claim submitted by a representative of the workers against the lack of response by the City Council of the request for access to information on the list of people affected by the agreement to absorb the specific productivity supplement and the exact amounts that this agreement has entailed for each of the workers.

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 Counsel, the following is reported:

Background

1 On January 11, 2021, a request for access to public information was submitted to the City Council requesting:

"List of the people affected by the agreement to absorb the specific productivity supplement and the exact amounts that this agreement has meant for each of the City Council and IMPIC workers".

2. On March 22, 2021, the applicant filed a complaint with the GAIP against the City Council for the lack of response to the request for access to public information requested by reiterating his initial request.

3. On April 29, 2021, the GAIP will send the claim to the City Council 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 applicable, specify the third parties affected by the claimed access.

4. On May 31, 2021, the GAIP reiterates the claim made to the City Council on April 29, 2021.

5. On June 17, 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 government, in relation to the claim presented.

6. On June 29, 2021, this Authority has evidence of the City Council's response to the requirements made by the GAIP.

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 request a report from the Catalan Data Protection Authority, which must be issued within fifteen days.

For this reason, this opinion 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. 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

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), provides that all processing of personal data must be lawful (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 article 6.1 to apply. Specifically

section c) provides that "the treatment is necessary for the fulfillment of a legal obligation applicable to the person responsible for the treatment" (letter c).

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

Article 18.1 of the LTC establishes: "People have the right to access public information, referred to in article 2.b, individually or in the name and representation of any legally constituted legal person". The aforementioned 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 one supplied by the other obliged subjects in accordance with the provisions of this law".

In this sense, the information related to the remuneration of the Corporation's staff is information that must be considered public for the purposes of article 2.b) of the LTC and, therefore, remains subject to the right of access provided for in this regulation. In any case, the right to public information is not absolute and can be denied or restricted for the reasons expressly established in the laws.

In addition, with regard to the regime of access to public information, the first Additional Provision of the LTC establishes that access to information is regulated by other specific regulations and, additionally, by this law."

Thus, in the case at hand, it will be necessary to analyze whether there is a special regime that enables access to the information requested or, alternatively, whether this access is possible in accordance with the transparency regulations.

III

In his claim, the applicant alleges that he is asking for the "list of people affected by the agreement to absorb the specific productivity supplement and the exact amounts that this agreement has meant for each of the City Council's employees and of the IMPIC" and requests access to this information "as a trade union delegate and members of the Trade Union Section of UGT at(...)"

Although the terms in which the applicant requests access, and also the terms in which the City Council expresses itself in its report dated June 22, 2021, may raise some doubts about the supplement that tender, since it refers to the "specific productivity supplement", it should be borne in mind that the general budget of the City Council for the year 2020 extended for the year 2021, published in the BOP (...), number 170, of September 2, 2020 also uses this same denomination, specifically, point 8 sections 1 and 2 (page 60) which regulates the overall increase in remuneration, which states that "For the purposes of the absorption of personal supplements existing transients (Productivity Specific Supplement and Compensation Specific Supplement), 100 percent of the increase provided for in this section will be absorbed."

Therefore, in this report it will be considered that the applicant is referring to the productivity supplement.

Having said that, the person who submits the request does so in his capacity as a trade union delegate and member of the Trade Union Section of UGT in the (...) and the information requested refers to the remuneration of the staff of the City Council (...), as can be seen from the Mayor's decree number 2021-0423 which is attached to the file. For this reason, it will be necessary to take into account, in the first place, the forecasts that may affect in the event that the person making the claim is considered a trade union delegate.

In this sense, with regard to trade union delegates, article 10.3 of Organic Law 11/1985, of August 2, on Trade Union Freedom (hereafter LOS) establishes:

"Union delegates, in the event that they are not part of the works committee, will have the same guarantees as those legally established for the members of the works committees or the representative bodies that are established in the Public administrations, as well as the following rights except for what could be established by collective agreement:

1.º Have access to the same information and documentation that the company makes available to the works committee, union delegates being obliged to keep professional secrecy in those matters in which they legally proceed.

(...)"

According to the regulations, they are the staff boards or delegates (art. 39 Royal Legislative Decree 5/2015, of October 30, which approves the revised text of the Law on the Basic Statute of the public employee, hereinafter TRLEBEP), as well as the Company Committee (art. 63 of the Workers' Statute, Royal Legislative Decree 5/2015, of 30 October, hereinafter ET), the specific bodies representing civil servants, and of public workers with employment contracts, respectively, and as such exercise the functions granted to them by the corresponding regulations (art. 40 TRLEBEP and art. 64 ET), among others, receive information on the data relating to the evolution of the remuneration that grants them the right to obtain certain information.

Thus, according to article 40.1 of the TRLEBEP, the boards and personnel delegates have the following functions, among others: "a) Receive information, on the personnel policy, as well as on the data referring to the evolution of the retributions , likely evolution of employment in the corresponding field and performance improvement programs."

According to article 64.1 of the ET the works committee has the right to be informed and to be consulted, in the terms of this same article, on the various issues that may affect the workers, on the situation of the company, and on the evolution of employment in the company, or hiring forecasts, etc.

In accordance with the above, the remuneration information that, according to the applicable regulations, should be provided in this case to the trade union representative, is not associated or individualized information for each worker, but would be general information.

However, it should be noted that the claimant requests the "list of people affected by the agreement to absorb the specific productivity supplement" as well as "the exact amounts that this agreement has meant for each of the workers". Therefore, it requests the individualized information (names and surnames) of each of the workers affected by the agreement. Therefore, it does not appear that in the light of the specific regime applicable to trade union delegates, the requested information can be accessed.

In this sense, the judgment of the Supreme Court of February 9, 2021 (number 160/2021) is relevant, when in the sixth legal basis it states:

"It is relevant, therefore, that it mediates the proper relationship between the personal data of the statutory staff that are requested, with the important trade union function that is carried out. So that only when these personal data are necessary for the exercise of trade union work, they could be considered exempt from consent, but not when they are disconnected or their relationship is unknown, as their connection with said trade union functions has not been made clear.

In the application on folio 13 of the administrative file, when documentation and information are requested, no explanation is given, nor is any reference or mention made about the utility of the same for the fulfillment of its trade union duties. There is also no attempt to link your request for data with the tasks legally attributed to union representatives. In other words, the reasons why it was necessary, relevant, or simply convenient for the exercise of its trade union function to carry out that massive and indiscriminate dumping of personal data were not justified. (...)

Consequently, the mere invocation, without justification, of the trade union representation cannot serve as an excuse to access all types of documentation, if it is not wanted by this means to empty the content of the fundamental right to data protection, when the holder de los mismos ignore the use that is made of their data, losing their power of disposal, in cases where the occurrence of any of the legally established exceptions is not justified."

Therefore, in accordance with what has been stated, it is necessary to analyze the possibility of accessing the information in the terms requested by the claimant, in accordance with the provisions of the transparency legislation.

IV

Given that the information you want to access contains personal data that is not considered to be particularly protected data under the terms of Article 23 of the LTC, Article 24 of the LTC will have to be applied:

"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 case

concrete, the protection of personal data or other constitutionally protected rights should prevail.

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."

Access to the requested personal information requires a prior reasoned weighting between the public interest in disclosure and the right of the affected persons which, in this case, according to the relationship provided by the City Council, would affect one hundred and sixty four people (eighty-seven employees of the City Council (...) and seventy-seven employees of (...)).

In this weighting, special consideration is given to the fact that the claimant is a trade union representative, given the functions, among others, of control and monitoring of compliance with current regulations, of established agreements, as well as obtaining information from the evolution of remuneration, which, as explained, is attributed to them by the EBEP, the ET and the trade union legislation.

The purpose of the Transparency Law is to establish a system of relations between people and the public administration and 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 retention of accounts and responsibility in public management (article 1.2 LTC).

Thus, if citizens must be able to have this ability to control and hold public administrations to account, with more reason, if applicable, it will be necessary to recognize this ability to a trade union delegate, in relation to information that may be relevant to the development of their functions.

In this sense, the City Council acknowledges in its report dated June 22, 2021 that "in conclusion, union delegates, by analogy with the rights that correspond to staff meetings and staff delegates, have the right to receive information on the data regarding the evolution of remuneration, the so-called specific productivity supplement that some public employees of this City Council have a concept that forms part of their remuneration."

With regard to the nature of the information to which access is sought, on the one hand, the claimant is referring to the list of workers (names and surnames) affected by the agreement to absorb the productivity supplement and on the other hand, the exact amounts (amounts) it has involved

this agreement for each of the workers. This information provides information on the productivity supplement, which is part of the complementary remuneration (articles 22.3 and 24 TREBEP and 103 TRLFP).

In this sense, it cannot be ignored that the disclosure of information that affects or contains data relating to the remuneration of a natural person can facilitate the obtaining of an economic profile of the affected person, although in this case, since it is only the amount of one of the complementary remuneration concepts, it does not seem that it can be considered that it allows the obtaining of such profile. In any case, the disclosure of individualized information on people affected by the absorption of the supplement with an indication of the resulting amount facilitates information on aspects of working life.

With regard to remuneration, article 11.1 of the LTC establishes that the Administration must make public: "The remuneration, compensations and allowances, the activities and assets of the members of the Government, of the senior positions of the Administration public sector and of the management staff of public bodies, societies, foundations and consortia, and the compensation they must receive when they cease to hold office." (letter b); as well as "The general information on the remunerations, compensations and allowances received by public employees, grouped according to the levels and bodies." (letter e).

For these purposes, article 25.1.a) of Decree 8/2021, of February 9, on transparency and the right of access to public information (hereafter, RLTC) details what is meant by remuneration and provides that "information must be given on the overall gross annual remuneration of the different bodies and levels, with details of the basic remuneration and the supplements that correspond according to the regulations, and the agreement or non-agreements that apply. In this sense, the remuneration tables of the personnel in the service of the public administrations must be published, with an indication of the basic and complementary remunerations, in the case of civil servants, and with an indication of the basic remunerations, complement of seniority, extraordinary payments and other supplements and specific bonuses according to the agreement or outside of the agreement, in the case of labor personnel."

Article 31 of the RLT specifies that "the annual remunerations of high-ranking officials of public administrations and of the management staff of entities of the public sectors of these, in accordance with the remuneration tables of the current year, such as the compensations and per diems that they have effectively received." And he adds that: "the information relating to variable remuneration must be published, first as the maximum expected in relation to the current financial year, and, subsequently, once the financial year is closed, with an indication of the amounts actually received for this concept."

In relation to this, article 4.2.b) of the LTC provides that the consideration of high positions "in the service of the local administration are the local representatives and the holders of the superior and management bodies, in accordance with the own local regime legislation".

And article 7 of Decree 8/2021, of February 9, on transparency and the right of access to public information (hereinafter, RLTC) adds:

"1. For the purposes of this decree, they are considered high-ranking officials and local management personnel, in any case, elected officials and the holders of bodies that exercise management or executive functions of a superior nature, adjusting their performance to the guidelines set by the governing body of the corporation, in accordance with the provisions of the local regulations.

2. It is up to each local administration to determine, in accordance with its organizational rules, the senior positions and its own management staff."

Given these forecasts in the field of active advertising, the weighting that needs to be done regarding access to the information of the productivity supplement perceived by the personnel who occupy these positions must necessarily be decided in favor of the right of access.

It should be remembered that this Authority has already supported the criterion (IAI 3/2019, IAI 33/2019, IAI 44/2019, IAI 1/2020, or IAI 1/2021), that the transparency obligations of article 11.1. b) LTC can be extended with respect to requests for access to information that affect personnel who occupy positions of special trust or special responsibility within an organization, positions of free appointment, or that involve a high level retributive This criterion should also be taken into account in relation to sites that involve a certain margin of discretion in terms of their provision.

With regard to the rest of the workers, article 11.1 of the LTC establishes that the Administration must make public "General information on the remuneration, compensation and per diems received by public employees, grouped according to the levels and bodies ." (letter e).

For these purposes, article 25.1.a) of the RLTC details what is meant by remuneration, and provides that "information must be given on the overall gross annual remuneration of the different bodies and levels, with details of the basic remuneration and the supplements that correspond according to the regulations, and the agreement or non-agreements that apply. In this sense, the remuneration tables of the personnel in the service of the public administrations must be published, with an indication of the basic and complementary remunerations, in the case of civil servants, and with an indication of the basic remunerations, complement of seniority, extraordinary payments and other supplements and specific bonuses according to the agreement or outside

The information must be published in aggregate. That is to say, associated with the public administration jobs in question grouped according to levels and the bodies to which they belong, without, in this sense, having to indicate the identity of the specific person who occupy a certain job. in the case at hand, it means that outside of these cases (article 4.2 b) LTC) it is considered unjustified to provide information on the exact amount that the agreement to absorb the productivity supplement for each of the workers individualized way

However, in the case at hand, there are other elements that must tip the balance in favor of access.

Thus, it may be relevant to obtain an individualized list of the people affected by the absorption agreement in order to be able to exercise the functions of monitoring compliance with the current regulations that the trade union representatives are assigned. Providing this information may be necessary for the purposes that the trade union delegate can control whether the regulations are being resp

the evolution of remuneration, compliance with agreements and detect any irregular actions that may have occurred, taking into account, in particular, the nature of this remuneration concept.

Article 103 of Legislative Decree 1/1997, of October 31, which approves the recasting in a single text of the precepts of certain legal texts in force in Catalonia in the field of public service, refers to productivity supplements and gratuities in the following terms:

"1. These are complementary payments:

(...)

c) The productivity supplement, the purpose of which is to reward special performance, extraordinary activity and the interest or initiative with which the official carries out his work.

The overall amount will be set for each program and administrative body through a percentage on total personnel costs, which will be determined by the Budget Law.

The Budget Law will also establish the criteria for the distribution of this supplement. The person responsible for the management of each spending program, within the corresponding budget allocations, will determine, in accordance with the regulations established by the Budget Law, the individual amount that corresponds to each official. The amounts received by each official for this concept will be public knowledge for the other officials of the department or the organization concerned and for the union representatives.

By regulation, each year, in accordance with the Budget Law, the technical evaluation criteria for the factors that determine the distribution will be established, as well as the participation formulas for the representatives of the staff involved.

d) Gratuities for extraordinary services provided outside the normal working day, which in no case can be fixed in amount or periodic in the right to receive them. Overtime cannot normally exceed the limit established by regulation. Extraordinary services can be compensated financially or with free hours of service.

2. The amount and the conditions to be able to receive the indemnities that due to service correspond to civil servants will be set by regulation."

In similar terms, Decree 214/1990, of July 30, is issued, which approves the Regulations for personnel in the service of local entities (articles 171 et seq.) and articles 5 and 6 of Royal Decree 61/1986, of April 25, which establishes the remuneration regime for the officials of the Local Administration.

In accordance with articles 172.4 and 173 of Decree 214/1990, it is up to the plenary session of each corporation to determine in the budget the overall amount destined for the allocation of the complemen

productivity and gratuities to civil servants within the maximum limits indicated in article 175.2.b) of this Regulation.

And as can be seen from articles 172.5 and 174 of this same Decree, it is up to the mayor or president of the corporation to distribute this amount between the different programs or areas and the individual allocation of the productivity supplement, with subject to the criteria that, if applicable, the plenary has established, without prejudice to the delegations that may be conferred in accordance with Law 8/1987, of April 15, municipal and local regime of Catalonia, as well as the 'individual allocation of gratuities.

It follows from all of this that the productivity supplement has a markedly personal character, although in accordance with the legal prescriptions, its appreciation must be carried out based on objective circumstances directly related to the development of the workplace and the objectives assigned to it, and their quantification must be adjusted to the criteria approved by the Plenary. And this may include not only the amount of the supplement, but also, if applicable, its absorbable character.

For the reasons stated, the data protection regulations would not prevent the trade union delegate from communicating the requested information, with an indication of the identity (name and surname) of the workers affected by the agreement to absorb the productivity supplement and the amount has meant this agreement for each of the workers.

conclusion

The data protection regulations do not prevent the workers' representative from communicating the individualized information they request, with an indication of the identity (name and surname) of the workers affected by the agreement to absorb the productivity supplement and the amount assuming this agreement for each of the workers.

Barcelona, July 12, 2021