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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 for the City Council's lack of response to the request of a representative of the workers designated as an observer in a selective process of a local police inspector to view and copy all the instances presented

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 in relation to the lack of response from the City Council at the request of a representative of the workers designated as an observer in a selective process of a local police inspector to see and copy all the instances presented.

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 January 27, 2021, a person who identifies himself as a staff delegate submits an application to a City Council in which he states that he has been appointed as an observer in a selection process for a position 'local police inspector and requests to be able to access and receive a complete copy of the applications submitted by all the candidates, both admitted and excluded, together with all the documentation that accompanies them.
2. On February 24, 2021, the City Council addressed a letter, signed by the president of the qualifying tribunal of the selection process and at the same time secretary of the local corporation, to the applicant indicating that "[...] both a instances such as the attached documentation contains sensitive and even specially protected data and given the abundant documentation presented, we take note of your request and require you to specify the documentation to which you want to have access, so that you can have at your disposal on 23.03.2021, date of the theoretical and practical test".
3. On March 24, 2021, the applicant addresses a new instance to the City Council accompanied by a letter in which he expresses his disagreement with certain actions, which he attributes to the president of the qualifying court in the selection process, relating to hindering his participation as an appointed observer in the selection process, as well as in his capacity as a staff delegate, and not providing him with the requested information.

In this letter, the applicant alludes to the lack of transparency of the selection process and states that "[...] it is more than obvious for a predetermined person to be the winner, and the administrative file simply tries to give an appearance of legality without actually existing."

He concludes his letter by referring to the fact that the qualifying court "[...] continuously prevents me from giving any type of information to this delegate and observer of the selection process [...]", and requests the hearing and copy of all the proceedings of the qualifying tribunal, as well as being granted access to the previously requested information.

4. On May 18, 2021, the applicant submits a claim to the GAIP in which he states that the City Council has not responded to his request, nor has he provided the information. It is worth noting that, although different documents accompany the claim, it is not clearly defined what is the specific public information about which access is claimed.

5. On May 27, 2021, the GAIP will send the claim to the City Council, requesting 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.

6. On June 7, 2021, the City Council sends the GAIP a report signed by the president of the qualifying tribunal in which it sets out different legal considerations related to the fact that "[...] The purpose of the selection process is the 'obtaining a technical judgment on the merits and capabilities of the applicants that is free from any political, trade union or similar interference. And so the EBEP has consecrated it by expressly excluding this staff from the composition of the selective bodies", referring to the fact that the selection process must be carried out through collegiate bodies which must be subject, among others, to the principle of impartiality, and in which elected or politically appointed personnel, temporary officials and contingent personnel cannot be members, as well as their membership must be in an individual capacity and it cannot be exercised on behalf of or on behalf of anyone.

At the same time, it also refers that "[...] no general rule foresees the possibility that members outside the selective body and the principles of impartiality and professionalism may intervene in the sessions of these bodies even if it is without the right of vote", and defends that the bases of the call are an administrative act that is dictated in application of the current regulations, through which the legal system cannot be innovated or the selective bodies can be configured in a different way than provided for in the regulations

7. On June 8, 2021, the GAIP addresses a letter to the claimant requesting that he specify what the object of the claim is, if the request for a view and copy of the instances presented with the corresponding attached documents of all the admitted and excluded candidates, or the relative request for sight and copy of all the acts of the court.

8. On June 28, 2021, the claimant sends an email to the GAIP in which he outlines his claim to the hearing and copy of the instances presented by all the candidates in the police inspector selection process local, both those admitted and those excluded, together with all the documentation that accompanies them.

9. On June 29, 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 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 »); will be considered a natural person

identifiable 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 physical, physiological identity, 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, 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 at hand in which access is requested to all the instances or requests presented in the local police inspector selection process, including the documentation provided, this information must be considered public in accordance with article 2.b) of the LTC, being information in their possession as a result of the exercise of their powers.

However, to the extent that the information is part of the information necessary for the operation of an administrative body (the qualifying court) of which the applicant is a member, still

that not as a member with the right to vote but as an observer, it does not seem that the access regime provided for in the LTC should be applied in this case, which is not intended to regulate the access of people who they are part of the body that must process the procedure in which the claimed information is contained, but an assessment of the need for the information for the exercise of the functions that correspond to them as an observer must be made.

And this without prejudice to the fact that the person making the claim must be granted the same guarantees regarding their right of access as any other citizen, as would be the case of being able to present the claim that has led to the issuance of this report.

III

According to what appears in the file sent, the object of the claimant is access to all the applications submitted by the candidates in a selection process for a position of local police inspector (d 'henceforth, selection process), including the documentation provided. The applicant refers to his position as representative of the workers who has been appointed as an observer in the selection process.

From the point of view of the position of representative of the workers, it must be borne in mind that the representation of civil servants is carried out, according to each case, by the Personnel Delegates or the Personnel Boards, in accordance with the provisions of article 39 of the Royal Legislative Decree 5/2015, of October 30, which approves the revised text of the Law of the Basic Statute of the Public Employee (from now on, the EBEP).

Among other functions, the regulations attribute to workers' representatives the function of monitoring compliance with current regulations (art. 40.1.e) EBEP). Given this regulatory provision, it cannot be ruled out that, for the exercise of this function, he may have access to certain information about the selective processes, but the current regulations do not provide for the right of the workers' representatives to access the information that is request

However, it should be noted that the applicant has been designated as an observer in the selection process.

Articles 55 et seq. of Royal Legislative Decree 5/2015, of October 30, approving the revised text of the Law on the Basic Statute of Public Employees, all citizens have the right to access to public employment in accordance with the constitutional principles of equality, merit and capacity, through procedures that guarantee their fulfillment as well as, among others, the principles of transparency, impartiality and professionalism of the members of the selection bodies and the independence and technical discretion in the performance of the selection bodies (art. 55 EBEP).

Regarding the selection bodies, article 60 of the EBEP, and in similar terms articles 42 and 54 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, provides for the following:

"1. The selection bodies will be collegiate and their composition must be adjusted to the principles of impartiality and professionalism of their members, and will also tend to parity between women and men.

2. Elected or politically appointed staff, interim officials and temporary staff may not form part of the selection bodies.

3. Membership of the selection bodies will always be on an individual basis, not being able to be held on behalf of or on behalf of anyone.

In the local area, with regard to what interests us in this report, article 286.1 of Legislative Decree 2/2003, of April 28, which approves the revised text of the Municipal and Local Regime Law of Catalonia foresees the need to guarantee compliance with the constitutional principles of equality, merit and capacity in staff selection processes, and in relation to selection tribunals, article 292 provides the following:

"292.1 The members of the courts or similar bodies must be appointed by the corporation in accordance with the following rules: a) One third is made up of members and/or officials of the same corporation. b) Another third is made up of technical staff. c) The other third is made up of representatives of the School of Public Administration of Catalonia, at the proposal of the School itself. [...]

292.4 The appointment of the court or a similar body corresponds to the body of the local entity competent for the appointment of the officials in question.

292.5 The contests to provide jobs must be decided motivated by the plenary session of the corporation, at the proposal of the court or a similar body designated for these purposes.

292.6 The regulation of the composition and operation of courts or similar bodies is what is established by regulation. [...]"

At the same time, taking into consideration that in the case we are concerned with the information to which access is sought belongs to a selection process for a local police inspector job, it is necessary to comply with the provisions of Law 16/ 1996, of July 10, of the Local Police and Decree 233/2002, of September 25, which approves the Regulation of access, promotion and mobility of the local police. To this end, article 32 of the law, and in similar terms article 8 of the decree, provide for the following:

"-1 The members of opposition courts and similar bodies must be appointed by the corporation, in accordance with the following rules: a) One third must be made up of members or officials of the same corporation. b) Another third must be made up of technical personnel specialized in this matter. c) The remaining third must be made up of representatives from the Department of Governance, among whom there must be at least one representative from the Catalan Police School and one representative from the General Directorate of Citizen Security.

-2 The regulation of the composition and operation of opposition courts and similar bodies is governed by the general regulations on civil service applicable to local corporations".

On the other hand, in relation to the selective systems, it is necessary to mention the provision of article 61.7 of the EBEP, whereby:

"The selective systems of fixed labor personnel will be those of opposition, competition-opposition, with the characteristics established in the previous section, or merit assessment competition.

The Public Administrations will be able to negotiate the forms of collaboration that, in the framework of the collective agreements, determine the action of the trade union organizations in the development of the selective processes."

In this sense, it is necessary to refer to the provisions of the Collective Agreement of the City Council [...], published in the BOP on [...], in force at the time of issuing this report, which regulates the working conditions of the labor and civil servants who provide services to the City Council. The collective agreement provides, among other things, that "[...] In the selection process, the staff representation will designate an observer to be part of the selection body as a member with voice and no vote. [...]"

At this point, in relation to the participation of staff representation in the selective body as a member provided for in the collective agreement, it must be noted that the City Council bases its defense of its decision denying access to that the EBEP excludes, in short, that the representation of the staff is part of the composition of the selective bodies, referring to the fact that the selection process must be carried out through collegiate bodies which have to be subject, among others, to the principle of impartiality, and in which elected or politically appointed staff, temporary officials and temporary staff cannot be part, as well as that their membership must be individual title and cannot be exercised on behalf of or on behalf of anyone.

To this end, the Judgment of the Superior Court of Justice of Catalonia (Social Chamber, Section 1a) number 17/2018, of 24 May, analyzes this issue and reaches the following conclusion:

"Applying the doctrine exposed to the case at hand, it is considered that the provision of article 22.5 of the collective agreement relating to one of the members of the selection body being designated by the representative body of the workers, which is not but the body of defense of the interests of a group whose members are elected by the majority in lists presented by the unions, being these who also promote the holding of elections in an absolute majority way, although it does not assume a mandate or direct representation does not prevent appreciation of the link between the two, the fine thread that unites them, which struggles with the technical nature and impartiality is no longer only subjective, but also objective that must preside over the composition of the selection body and that the legislator has tried to guarantee through the limits set in the article 60.3 of the EBEP, prohibiting the professional persons, and all por dicho órgano lo sean in attention to criteria of equality, merit and capacity".

The sixth base of the bases governing the selection process (DOGC [...]) establishes the following:

"It will be established in accordance with the provisions of art. 60 of Royal Decree 5/2015, of 30 October approving the revised text of Law 7/2007 of 12 April on the Basic Statute of the public employee, and Decree 233/2002, of September 25, in which the regulation on access, promotion and mobility of local police officers is approved. The qualifying court will be integrated

by an odd number of people appointed by the corporation and formed by a president, members and a secretary and will have the following composition:

President: The Secretary of the Corporation or person to whom he delegates and his/her deputy.

Members: - One career employee of the City Council [...] and his/her deputy -
Two technical people specializing in the police function, with a qualification equal to or higher than that required by the position, and their substitutes
- A person appointed by the Public Security Institute of Catalonia and his deputy.
- A person appointed by the General Directorate of Security Administration or whoever has the competence and their deputy.

Secretary: A person from the City Council [...], with voice but no vote and alternate.

[...]

The workers' representatives may designate a person who will act as an observer without voice or vote."

Although the representative of the workers designated as an observer is not considered a member of the court with the right to vote, it is undeniable that, in accordance with the aforementioned regulatory provisions, and specified in the bases, he must have the necessary information to carry out the functions entrusted to him. And he will hardly be able to exercise his role as an observer without having access to information that justifies, even in the final stages of the selection process, the assessment of each of the selected candidates in relation to the rest of the participants.

Related to this, in the case we are dealing with it follows that due to the difficulties in exercising the duties of an observer, as stated by the person making the claim, he would have had to resort to addressing an instance to the City Council requesting access to the instances presented in the selection process prior to the date of the theoretical and practical test, in accordance with what is apparent from the City Council's written response on February 24, 2021.

That is to say, in the particular case, to the extent that the person making the claim holds the position of observer, in accordance with what has been explained, he/she has the possibility of accessing the information related to the selection process, including the personnel related to the candidates, as well as being present at the different sessions of the qualifying board and addressing the queries it deems relevant, all this in relation to its task of monitoring that the action of the qualifying board complies with the regulations currently applicable to the selection process. Because, it must be remembered, the role of the observer in a qualifying tribunal is not to evaluate the candidates but only to observe or control the legality of the tribunal's actions.

From the perspective of the people affected, that is to say, the candidates who have submitted their application in the selection process, regardless of whether they have subsequently been admitted or excluded, the expectations they may have at the time they participate in the selective process is that the members of the qualifying body must be able to have access to their data. And this also includes the expectation that your personal information can be accessed by a possible observer appointed by the workers' representatives in accordance with the basis of the call.

In accordance with what has been stated, the exercise of its function may involve the participation of the observer in the performance of the tests, if applicable, in the meetings of the qualifying board and also the access to the information that is the subject of analysis by the court and that which appears in the records of the qualifying court, given that otherwise it would be difficult to exercise its function. However, for the exercise of its function, it is not justified to obtain a copy of all the documentation presented by all the participants, given that this significantly increases the risks, especially if there is a large number of people who participate in the call, without it being necessary to control the action of the court.

Given the diversity of the information that may have been provided by the affected persons, which may include special categories of data, and the serious repercussions that the disclosure, intended or accidental, of the data contained therein may have for them, it would be necessary to limit the 'access to the possibility of consulting the instances and the documentation provided to the extent necessary to analyze the action of the qualifying tribunal, during its sessions or once they have already taken place. And in any case, in accordance with the second paragraph of article 72.3 of Decree 8/2021, of February 9, on transparency and the right of access to public information, it should be done only through the consultation, instead of obtaining a copy, to the extent that elements are not appreciated that, due to the functions attributed to the observer, justify their prior access to the court meetings and, with less reason, the obtaining a copy of the submitted documentation. It is worth saying, on the other hand, that this does not affect the possibility that, subsequently, the selection process has progressed and once the session of the qualifying body has taken place, the observer can obtain a copy of the minutes or proceedings of the qu

Given what has been stated, in particular due to the fact that the person making the claim holds the status of observer in the selection process, although access to the information requested by the person making the claim entails an interference with the right to the protection of candidates' data, there are no specific circumstances from which it can be considered that the right to data protection of those should prevail over the claimant's right of access, to the instances presented, including - the documentation provided, but limited to your consultation.

All this, without prejudice to the duty of confidentiality applicable to the claimant in accordance with article 5 of the LOPDGDD, according to which:

- "1. Those responsible and in charge of data processing as well as all the people who intervene in any phase of this will be subject to the duty of confidentiality referred to in article 5.1.f) of Regulation (EU) 2016/679.
2. The general obligation indicated in the previous section will be complementary to the duties of professional secrecy in accordance with applicable regulations.
3. The obligations established in the previous sections will be maintained even when the relationship of the obligee with the person responsible for the treatment has ended."

conclusion

The data protection regulations do not prevent a representative of the workers designated as an observer in a selection process in accordance with the applicable collective agreement and the basis of the call, from being able to access information relating to candidates for through their presence in the tests and sessions of the qualifying body and to consult the information provided by the candidates, in order to monitor compliance with current regulations. However, given their functions, obtaining a copy of all the documentation presented by the candidates is not justified.

Barcelona, July 22, 2021

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