

IAI 58/2021

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 for a City Council's denial of access to a report by the local police chief.

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 a City Council's denial of the request for access to a report from the local police chief.

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 April 8, 2021, a request is presented to a City Council, in which a councilor, spokesperson for a municipal group, requests access to a report from the Chief of Local Police.

The request is based on the need to carry out your work.

2. On April 12, 2021, the City Council notifies the councilor of the denial of his request on the understanding that, although he has the right to obtain from the mayor the background, data or information held by the services of the corporation and that are necessary for the development of its function, access may lead to the knowledge or dissemination of information which may violate the constitutional right to honor, personal or family privacy or one's image. At the same time, it also considers that the intended access may harm the rights of minors and privacy and other legitimate private rights.

It explains that the report being requested is an administrative document from which the local police informs social services of an action that highlights personal circumstances of particular sensitivity, including special categories of agreement data with the personal data protection regulations. For this reason, the City Council considers that the request must be denied "[...] without prejudice to the fact that it can be provided with anonymized personal data if the justified reasons for clearly the need to obtain such information".

3. On July 8, 2021, the councilor presents a new request under the same terms as the one on April 8, 2021.

4. On July 15, 2021, the councilor formulates a new instance in which he explains that, in accordance with local regulations, "[...] access will be authorized by the mayor (or mayoress) , through an express or presumed resolution granted by positive administrative silence when five calendar days have passed since the request and the councilor requesting the corresponding resolution has not been notified. That we are on 07/15/2021, and that the five-day deadline set by the Instruction has been exceeded".

He requests access "[...] by positive silence, in application of the Instruction on councilors' access to documentary records."

5. On July 19, 2021, the City Council notified the councilor that the requests dated July 8, 2021 and July 15, 2021 "were already resolved by decree 2021-604 and that, therefore, the effects of this decree are applicable to him". He adds, that "[...] this decree constitutes the reproduction of a firm and consented resolution and, therefore, cannot be the subject of any appeal, without prejudice to the fact that those who are actively entitled may file any legal appeal."

6. On July 26, 2021, the councilor presents a claim to the GAIP in which he states that the City Council, although it has responded to his request, has not delivered the information. It motivates the claim, in relation to the antecedents that have been exposed, according to the following grounds:

"1) There is a positive administrative silence that has not been taken into account. 2) As a councilor that I am, control of municipal action is reason enough to have access. 3) The fact that I was denied access in April is no reason to deny access in July, since I can request access as many times as I see fit. 4) My rights are being violated that I have based on the Law on Transparency, Access to Public Information and Good Governance".

7. On July 30, 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.

The file sent does not include the City Council's response to the GAIP's request.

8. On August 9, 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 public information and good governance.

Legal Foundations

I

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

Article 42.8 of Law 19/2014, of December 29, on transparency, access to public information and good governance, which regulates the claim against resolutions on access to public information, establishes that if the refusal has been based on the protection of personal data, the Commission must request a report from 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 by means of 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 identity 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/EC (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".

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. In this sense, the RGPD establishes the need for one of the legal bases of article 6.1, among which section c) foresees the assumption that the treatment "is necessary for the fulfillment of a legal obligation applicable to the responsible of 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

they are applied 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).

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 as a spokesperson for a municipal group, which means that the provisions established by the local regime legislation are applicable, 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 Consolidated Text of the Municipal and Local Regime 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>).

Thus, 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 background, data or information that is in power of the corporation's services 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 mayor or the president, or from the governing commission, all background, data or

information that is in the possession of the corporation's services and is 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, published in the BOPB in [...], modified and published on [...], regulates the right to information of councillors. The ROM recognizes this right to municipal groups, and states that they have the right to obtain from the Mayor all the background, data, information and copies that are in the possession of the municipal services and that are necessary for the development of their function .

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

On June 27, 1998, it already stated that "[...] To be able to carry out this supervisory and controlling function, it is necessary to know beforehand all the data and background that are needed for this purpose, which implies the need to have access to all the data, background and information [...] to then select those who can be useful in the fulfillment of the function entrusted to the 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 No

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. Therefore, it is relevant to consider whether the information you seek to access is necessary for the performance of your functions.

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

In the case at hand, in the denial resolution, the City Council states that the report to which the councilor intends to access corresponds to a document through which the local police informed the social services of an action that highlighted personal circumstances of special sensitivity, which would include special categories of data at the same time that could affect minors and other private rights, reasons why the City Council considers that the request violates the constitutional right to honor, personal privacy or family or one's own image.

But in addition, given that the exercise of the councilor's right of access could lead to a limitation of the fundamental right to the protection of personal data, it will be necessary to determine whether it is a proportional limitation, given that, according to repeated doctrine of Constitutional Court, the limitation of fundamental rights can only occur proportionately (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.

Prior to the analysis of the substantive issue, it is important to make a note regarding the councilor's statement, formulated in the instance addressed to the City Council on July 15, 2021 and, subsequently, in the claim presented to the GAIP, for which it refers to the estimate of the request for access through the administrative silence route, to the extent that it considers that the deadline to resolve its request dated July 8, 2021 has expired, without the City Council having resolved it.

For this purpose, although the regulations of the local regime regarding the right of information of members of local corporations provide for the estimated meaning of administrative silence in the event that a negative resolution is not issued, and is notified, within four days from the date of its presentation (art. 164.3 TRLMRLC), in the case at hand it is relevant to take into account that the request dated July 8, 2021, on which the councilor intends to 'estimi the access requested by way of administrative silence, is a replica of a previous request formulated in identical terms, on April 8, 2021, and which was denied through a resolution of the City Council that was notified on April 12, 2021.

It should be borne in mind that the fact that the request is manifestly repetitive or has an abusive nature that is not justified for the purpose of transparency of the regulations is a reason for the inadmissibility of the access request (art. 18.1.e) LT, of supplementary application). And the fact that a request that has already been denied expressly and with reasons is reiterated, cannot harm the rights of third parties affected, nor can it harm the normal functioning of the administration, as would happen if through the reiteration of the request could end up hindering the normal functioning of municipal services, especially considering that the deadline to resolve is only four days from the submission of the request for information.

Thus, to the extent that the City Council denied the councilor's request made on April 8, 2021, it is considered that the councilor cannot pretend through the route of silence in the face of reiteration to access information which it has already been denied with reasons.

v

The councilor has requested from the City Council access to a report from the head of the local police in order to be able to exercise the functions that the regulations attribute to him as an elected member. In particular it refers to the control over the performance of the local corporation.

Point out that the specific content of the report is unknown, beyond the fact that the City Council stated in the refusal resolution that it was a document from which the local police informed the social services an action that highlighted personal circumstances of special sensitivity, which would affect minors, and which would include special categories of personal data.

Taking into account that we only have this information contained in the City Council's refusal resolution, and there are no other elements from which other factors can be deduced that could condition the meaning of this report, the analysis of the particular case must be carried out taking as reference, exclusively, said information.

Based on what the City Council sets out in the refusal resolution, it seems that the document to which the councilor intends to access would contain special categories of data. In this sense, it must be borne in mind that the regulations provide for the need to grant special protection to these categories of data, which would refer to ethnic or racial origin, political opinions, religious or philosophical convictions or affiliation union, and the processing of genetic data, biometric data intended to uniquely identify a natural person, data relating to health or data relating to the sex life or sexual orientation of a natural person (art. 9 of RGPD).

At the same time, the City Council also refers to the fact that the document affects social services, to the extent that it explains that through it the local police reported personal circumstances of particular sensitivity detected in the framework of an action which, on the other hand, it seems that they could affect minors. For this purpose, it is necessary to refer to the special caution that those responsible for the treatment must have in relation to the risks to the rights and freedoms of physical persons, resulting from the treatment itself, when the interested party as the owner of the information personnel undergoing treatment may be in a situation of vulnerability (with reference to vulnerable groups), and especially if it is a minor, to whom a specific protection regime must be applied in accordance with recitals 38 and 58 of the RGPD.

In summary, based on the information presented by the City Council, it seems that the document to which the councilor intends to access would contain the identifying data, or information that would make it identifiable, of people who may be in a vulnerable situation, including minors. In addition, the City Council refers to the fact that, among the information, special categories

It is clear that disclosing this information can lead to a significant interference in the rights to the protection of personal data of the people affected, to the extent that disclosing this information can affect a plurality of personal or intimate spheres.

From the perspective of the councilor's right to information, it may be relevant for the purpose of monitoring the performance of the local corporation to know certain information that affects the performance of the local police. However, this should not necessarily translate into the knowledge of any information that is in the possession of the corporation's services, especially when this information may affect personal spheres that require special protection.

In its response of April 12, 2021, the City Council indicated the possibility that the information could be provided anonymously. Despite this, it does not seem that in the case at hand anonymization can be an effective alternative to guarantee the rights of the people affected. The terms in which the request is formulated suggest that the councilor already has certain information about the case to which the report refers. And this includes, predictably, the possibility of ending up identifying the people affected, even if an attempt was made to anonymize the report.

On the other hand, although the regulations do not require councilors that, in order to access municipal information, they must explain or substantiate the purpose of their request, the concreteness of the purpose and, in particular, of the extent to which this information may be necessary for the exercise of their functions, it would allow a more detailed analysis when weighing up the right of access of the councilor and the rights of the people affected. In any case, and for the purposes of monitoring the performance of the municipal administration, it may be relevant

whether or not the City Council has acted on a certain problem and, where appropriate, provide general information on the actions taken, as long as it is general information and cannot negatively affect the situation of the people affected. But it does not seem that this can justify delivering a report intended for social services on a certain situation of social vulnerability.

Therefore, given the information that is available, given the eventual risk that personal information of vulnerable groups may be affected, and special categories of data, it is considered that in the case at hand the right must prevail to the data protection of the persons affected by the right of access to the councillor's information, and in this sense, deny their request.

conclusion

In view of the information available, data protection regulations would prevent the councilor from accessing the local police chief's report.

Barcelona, September 2, 2021