

IAI 63/2021

Report issued at the request of the Commission for the Guarantee of the Right of Access to Public Information in relation to the claim against a city council for the denial of a councilor's request for access to the municipal file (...) on preventive measures and control of a workplace of the municipal police

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 against a city council for the denial of the request access of a councilor to the municipal file on preventive measures and control of a workplace of the municipal police.

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 Adviser, I report the following:

Background

1. On July 30, 2021, an instance of a councilor was presented in the registry of (...), by which he requested access to the administrative file (...), which it deals with preventive and control measures of a workplace of the municipal police identified with its TIP.

2. On August 2, 2021 through mayoral decree no. (...) the city council resolved the request for access to information, with the following operative part:

"First.- Dismiss the request for access to the administrative file (...) made by the councilor (...) on July 30, 2021, with entry registration (...), with the motivation contained in the expository part."

The expository part states:

"(...)

Third.- Article 77 of Law 7/1985, of April 2, regulating the bases of the local regime, and article 164.1 of Legislative Decree 2/2003, of April 28, by which approves the revised text of the municipal and local regime law of Catalonia, establish that the members of the local Corporations have the right to obtain from the mayor any background, data or information in the possession of the Corporation's services that are accurate for the development of its function.

Fourth.- However, article 164.3 of the same legislative decree establishes that access to information must be denied when the knowledge or dissemination of the information may violate the constitutional right to honor, personal privacy or family or self-image.

Fifth.- In relation to the provision mentioned in the previous exhibit, article 21.1 of Law (Catalan) 19/2014, of December 29, on transparency, access to public information and good governance, establishes that the right of access to public information may be denied or restricted if the knowledge or disclosure of the information involves harm to: - (...) - f) privacy and other legitimate private rights - (...)

Sixth.- The aforementioned file contains documents that may affect the privacy of third parties.

(...)

3. On August 4, 2021, the councilor submits a claim to the Commission for the Guarantee of the Right of Access to Public Information (GAIP), for the denial of access to the municipal file, in which he states :

"That I am a councilor (...). That for the development of our task of controlling government action, we requested access to the municipal file (...). That the mayor via Decree has denied us access to the entirety of the file. That this refusal is contrary to the Law of Transparency, Access to public information and Good governance. That the City Council (...), and their mayor of course, are aware that there is the possibility of anonymizing part of the data in the file (those that are sensitive in the intimate personal sphere) since in multiple resolutions of the GAIP and by reports also of the APDCAT, this has been clearly indicated. However, once again and without learning from the resolutions that have occurred, they deny us full access to a municipal file."

4. On August 6, 2021, the GAIP requests the city council to issue a report on the claim submitted, identify the third parties affected by the access, send them the completed file to which it refers and indicate the person or persons who will represent the City Council at the mediation session.

On August 17, 2021, the city council sends the requested report to the GAIP.

5. On September 10, 2021, the GAIP addresses the request for a report to 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

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 RGPD defines personal data as "all information about 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 4.1 RGPD).

The information requested by the claimant consisting of the administrative file (...), which deals with preventive and control measures of a municipal police workplace identified with its TIP, is public information that contains data personal

In accordance with the definition of treatment in article 4.2 of the RGPD "consultation, use, communication by transmission, dissemination or any other form of enabling access, access or interconnection, limitation, deletion or destruction " of personal data, are data treatments subject to the principles and guarantees of the RGPD. Therefore, the communication of personal data by the ICS, as a result of the request made by the claimant, is data processing under the terms of the RGPD.

The RGPD provides that all processing of personal data must be lawful, loyal and transparent in relation to the interested party (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 its article 6.1 to apply. Specifically, sections c) and e) of article 6.1 of the RGPD provide respectively, that the treatment will be lawful if "it is necessary for the fulfillment of a legal obligation applicable to the person responsible for the treatment", or if "it is necessary for the fulfillment of a mission carried out in the public interest or in the exercise of public powers conferred on the person responsible for the treatment".

As can be seen from article 6.3 of the RGPD and expressly included in article 8 Organic Law 3/2018, of December 5, on the protection of personal data and guarantee of digital rights (LOPDGDD), the processing of data it can only be considered based on the legal bases of article 6.1.c) and 6.1.e) of the RGPD when so established by a rule with the rank of law.

At the same time, 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 the protection of personal data under this Regulation."

It follows from all this that the councilor's access to the personal data that may contain the information requested on the basis of the fulfillment of a legal obligation by the City Council (responsible for the treatment (art.6.1. c) RGPD), must necessarily be covered by a rule with the status of law.

According to article 18 of Law 19/2014, of December 29, on transparency, access to public information and good governance (hereafter, LTC) "people have the right to access public information , referred to in article 2.b, in an individual capacity or in the name and representation of any legally constituted legal entity" (paragraph 1). The information contained in the requested file is public information for the purposes of article 2.b) of the LTC, and therefore remains subject to the right of access in the terms provided by the transparency law

Now, the second section of the first additional provision of the LTC provides that "access to public information in matters that have established a special access regime is regulated by their specific regulations and, additionally, by this law."

In this case, the person requesting access has the status of councilor of the corporation. Therefore, the assessment that can be made with respect to the obligation to provide or not to provide personal information of third parties must be examined taking into account the right of access that the local regime regulations attribute to councilors - that is, Law 7/1985, of April 2, regulating the bases of the local regime (LRBRL) and the revised text of the Municipal and Local Regime Law of Catalonia, approved by Legislative Decree 2/2003, of April 28 (TRLMRLC) - regarding that information available to the City Council that is necessary for the fulfillment of its functions.

This without prejudice to the fact that the councilor who requests information must be granted at least the same guarantees regarding access to information as the rest of citizens who do not have this condition of elected office, given the 'supplementary application of Law 19/2014 (additional provision first section 2).

III

As this Authority has done on previous occasions (among others, reports IAI 48/2019, IAI 52/2019, IAI 3/2020, IAI 41/2020, IAI 27/2021, or IAI 28/2021 which can be consult the website <http://apdcat.gencat.cat>), the local regime legislation recognizes a right of access to the information available to the local corporation and that may be necessary for the exercise of the functions that correspond to them to all elected positions, regardless of whether they are in the government team or in the opposition.

Point out that, as can be seen from these reports, the right of access to municipal information corresponds to councilors and not to the municipal group.

Thus, article 77.1 of the LRBRL establishes that "all members of local corporations have the right to obtain from the Mayor or President or the Government Commission any background, data or information held by the services of the Corporation and are necessary for the development of their function".

In the same sense, the TRLMRLC pronounces itself, by providing, in its article 164.1, that "all members of local corporations have the right to obtain (...) all the background, data or information that are in the possession of the services of the corporation and are necessary for the development of its function."

The right to obtain all the antecedents, data or information that are in the possession of the services of the local corporation and necessary for the exercise of their functions, in accordance with repeated jurisprudence on this issue (SSTS September 27, 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 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 that they have

services of the City Council, for its control task and to document itself for the purposes of adopting decisions in the future (among others, STS of March 29, 2006).

However, the exercise of this right of access to municipal information is in any case subject to certain conditions provided for in the TRLMRLC, cited, and in the Regulation on the organization, operation and legal regime of local entities (ROF), approved by Royal Decree 2568/1986, of November 28, without prejudice to what may be established by the organization and operation regulations of each local entity.

It is therefore necessary to analyze the legal provisions of the aforementioned regulations in order to assess whether the local regulations, or alternatively the transparency legislation, would enable the access claimed by the councilor in the present case.

IV

Article 164.2 of the TRLMRLC establishes in which cases the corporation's services must provide information directly to the elected members. Thus, this article provides:

"2. The corporation's services must provide information directly to the members of the corporations when: a) They 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."

Direct access does not mean, however, that there is a right to indiscriminate access to the information referred to in these articles, but rather that before making this information available to councilors, the city council must take the appropriate measures, which they may vary in each case, in order to facilitate access to information without violating the right to data protection, especially with regard to special categories of data or others that require special protection.

In the case at hand, the councilor's request is for access to a specific municipal file. This request goes beyond the direct access provisions of article 164.2 TRLMRLC, so it will be necessary to take into consideration what is established in article 164.3 TRLMRLC, as well as the procedure applicable to these requests for access provided for in the article 14 of the ROF.

Article 164.3 TRLMRLC, establishes.

"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 resolution 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 own image.

b) When it comes to matters affected by the general legislation on official secrets or for summary secrecy.”

In accordance with this regulation, requests for access to information held by the corporation's services made by councilors must be subject to an authorization procedure by the president or the Board of Governors. These requests may be denied when any of the circumstances provided for in articles 164.3 of the TRLMRLC occur, but they could also be denied, given the nature of the right to data protection (STC 292/2000), when there are other circumstances specifics related to personal data that justify it, in particular under the principle of data minimization, according to which "personal data will be adequate, relevant and limited to what is necessary in relation to the purposes for which they are treated" (Article 5.1.c) RGPD)).

This principle implies, on the one hand, that access to municipal information that includes certain personal data, without the consent of those affected, must necessarily be linked to the exercise of the functions that correspond in each case to the councilor of that it is treated, in the terms provided for in the local regime legislation.

Thus, the processing of personal data that may be carried out by councilors who do not have assigned government responsibilities, as would happen in the present case, would find its justification, from the perspective of data protection, in the exercise of the functions that are assigned as members of collegiate bodies of the local entity itself and, in a special way, in the functions of control and supervision of municipal action, such as the formulation of questions, interpellations, motions or until and all the motion of censure, which the local regime regulations attribute to

On the other hand, the principle of minimization requires that a weighting exercise be carried out in order to assess the implications that the exercise of the councilors' right of access to information may have for the rights of the people affected, taking into account, for this purpose, the circumstances of the specific case, the personal data contained in the requested information, the intended purpose and the terms with which the request is made or the possible subjects affected, among

The aim of this weighting is to prevent excessive or irrelevant personal data from being communicated to the councilors to achieve the intended purpose of the access, which must necessarily be linked to the performance of the functions of the councilors who request the information.

v

In the case we are dealing with, the requested information is "the administrative file (...), which deals with preventive measures and workplace control - (...)".

At the outset, from the analysis of the documentation that makes up this file, it can be said that it contains information, as would be the case of the action protocol against situations of workplace harassment applicable to City Council staff (...), which, as it is a protocol does not include personal data, or the decree approving this protocol which only includes the data of the mayoress and the secretary who sign it as well as the person in charge of the town hall that proposes it.

Access to this information does not seem to be limited to the councilor from the point of view of data protection regulations (art. 24.1 LTC and 70.2 RLTC).

However, the rest of the documents in the claimed file contain personal data of the person who presents the instance for alleged harassment at work, of the people investigated for the alleged harassment (identified both with their first and last names and with their TIP) , of the municipal employees who investigate the file, as well as of the local police who are interviewed as witnesses (identified with their TIP).

The file claimed is reserved during its processing, so it must be taken into account that the LTC itself establishes the possibility of limiting or denying access to public information if its knowledge or disclosure entails a detriment to the investigation or sanction of the administrative or disciplinary offense in question (article 21.1.b)). However, in the case we are dealing with, this procedure would have ended with the City Council considering that it was appropriate to file the complaint of workplace harassment in accordance with the Report of the Commission of Investigation, considering that no type of harassment The reserved nature of this type of procedure means that it is necessary to analyze in each case whether it is appropriate to facilitate access to its content.

As this Authority has previously highlighted, the protection that the data protection regulations and the LTC itself imposes on personal data relating to the commission of criminal or administrative offenses must be extended to cases of previous investigations even if these have ended without the initiation of a sanctioning file. The disclosure of information relating to the fact that a person has been reported (in the case at hand for a case of workplace harassment) can produce the same damage to the reported person's reputation, whether in the field work, social or even family, than in the case of the initiation of a sanctioning file.

Also, from the analysis of the documentation that makes up the case file, it can be seen that it incorporates references to situations where the reporting person was discharged and to the performance of psychotechnical tests for the use of the weapon that could reveal aspects of the her health and therefore special categories of data relating to the complainant.

In addition, it cannot be ignored that given the matter on which the file is concerned, the information contained has a direct impact on the privacy of the people affected and its disclosure may have harmful consequences on the professional and personal reputation, both for what does it do to the people investigated for the alleged harassment as well as to the reporting person himself.

In the case at hand, the councilor does not justify the need to access this information beyond the need to carry out his duties. In this regard, it should be remembered that, although in accordance with local regime legislation and the jurisprudence of the Supreme Court, councilors cannot be required to explain or substantiate the purpose of their request in order to access municipal information .-since the reason for their request must be understood as implicit in the exercise of their functions as councilors, who are responsible for the control and supervision of the governing bodies of the corporation, as as explained in article 22.2.a) of the LRBRL:-. in order to facilitate the weighting that the City Council, as responsible for the treatment,

relevance of the access, the statements that the councilor may make regarding the specific purpose of the access must be taken into consideration.

In the present case, the councilor bases the request on the "development of our task of controlling government action". For the control of the action of the municipal government, it seems justified that the councilors can know what the municipal action has been as a result of the complaint presented, what the nature of the problem has been and the repercussions it may have had on the operation of the municipal services. Consequently, from the perspective of the councilor's right to information, it may be justified to provide him with access to information on the content of the action protocol against situations of workplace harassment approved by the City Council, if instituted a file in application of this protocol, the reason that has founded the file and the result thereof.

Now, taking into account the sensitivity of the information that can be contained in this type of files, the development of the control task of government action without any other element that grounds the need to access the personal data contained in the file, it does not seem that it can be considered as a sufficient justification that should prevail over the right to data protection of the affected persons and that allows them to access the entire content of the same.

Finally, in his complaint, the councilor mentions the possibility that the city council will provide him with the information in an anonymized manner.

It should be clarified that any anonymization process, applied to personal data, must aim to destroy the link or nexus between the personal data and the affected natural person to whom the information refers. The aim of anonymisation is therefore that the affected person cannot be identified by third parties without disproportionate efforts.

As long as this link between the data and the physical person it refers to can be reconstructed in a relatively simple way - in this sense, it is necessary to consider all the objective factors, such as the costs and time required for identification, as well as the technology available -, it cannot be considered that the information has been subject to an appropriate anonymization procedure and will remain subject to the principles and obligations derived from the data protection regulations.

In the case we are dealing with, the circumstance is that the person making the complaint is a local police officer, that the people investigated for the alleged harassment are their superiors and that the people surveyed in the procedure are officers of the same local police. It must be taken into account that the staff of the City Council (...), with regard to the subscale of special services, consists of 11 officers (with two vacant positions), one sergeant and three corporals (with one position vacant),- according to the approval of the budget and staffing for the year 2021, published in the BOPB (...).

In addition, the fact that he requests a specific file indicates that the claimant has prior information about the case that may allow him to re-identify the affected persons without disproportionate effort.

In this context, it seems that an anonymization of the data of the affected people would not be effective, taking into account the small number of people who make up the staff of the

local police, and the context in which it occurs that makes it foreseeable the possibility of re-identification by the requesting councilor of the people involved without disproportionate efforts.

conclusion

The regulations on the protection of personal data do not prevent the councilor from giving information relating to the approval of the action protocol against situations of workplace harassment applicable to the City Council's staff, to the fact of whether the protocol has been followed or no, and the information relating to the reason behind the claimed file and the result thereof, without including data on the affected persons. Access to the rest of the information contained in the file would not be justified.

Barcelona, October 1, 2021

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