

IAI 64/2021

Legal report issued at the request of the Commission for the Guarantee of the Right of Access to Information Public in relation to the claim against the refusal by a City Council of the request for access to the actions of the members of the Investigation Commission of the protocol for prevention, detection, action and resolution situations of psychological harassment and other discrimination at work

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 refusal by a City Council of the request for access to the actions of the members of the Commission of Investigation of the protocol for the prevention, detection, action and resolution of situations of psychological harassment and other discrimination at work.

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 June 17, 2021, a union representative presents a request to a City Council in which, on behalf of a union section and, at the same time, a worker requests, among others, access to *"All actions (in maximum detail) both informal (mediation) and formal (instruction, investigation and intervention) carried out by the members of the investigation commission of the harassment protocol (documents, interviews, visits of inspection, witnesses, agreements between parties, minutes of meetings, etc)"*.

According to the request, the worker reported to the City Council that he was the victim of workplace harassment by a councillor. As a result of this complaint, the City Council activated the workplace harassment protocol, and an investigation commission was set up which concluded its actions given that due to the complexity of being able to have all the information, the knowledge and the account of the events of the people involved in this process, it was not possible to establish a precise and objective assessment of the existence or not of signs of psychological harassment at work.

In this context, it can be seen that the worker is dissatisfied with the decision of the investigation commission, among other reasons, because the commission only convened a meeting with the aim of assessing whether mediation between both parties was possible, to which not all its members attended, and he has not been able to state the facts on which his complaint was based, in accordance with the provisions of the municipal workplace harassment protocol. For these reasons, among other issues that are not relevant from the perspective of data protection, requests access to the actions carried out by the investigation commission.

2. On June 18, 2021, the union representative addresses another instance to the City Council in which he requests access to the following information:

"1) Specific documentation to which the members of the Investigation Commission of the harassment protocol have accessed

2) Specific documentation to which the members of the Investigation Commission of the harassment protocol have not accessed or have not been provided

3) Evidence/minute of registration of access by the members of the Commission of Investigation of the Harassment Protocol to the documentation provided by the City Council [...]"

3. On July 16, 2021, the City Council sent a letter to the union representative in which it stated that, in response to both requests, the "[...] Commission has acted with objectivity, rigor and impartiality and has carried out all the actions it has deemed appropriate in relation to the evaluation of the facts related to the Workplace Harassment Protocol that has been activated, and consequently this Commission reiterates the response that was made to you on 06/17/2021 with Departure Register nº 1235". It should be noted, however, that the file sent does not include the response referred to by the City Council, dated June 17, 2021. Therefore, its content is unknown.

4. On August 4, 2021, the worker presents a claim to the GAIP, in his own name, in which he states that the City Council has responded to his request, but has not provided the requested information. tendered For this reason, he demands access to the documentation that the union representative requested on his behalf from the City Council on June 17 and 18, 2021.

He states that the claim is based on the need to access this information for the defense of his employment interests and to initiate legal actions.

5. On August 6, 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 where applicable, specifying the third parties affected by the claimed access.

On September 10, 2021, the GAIP reiterates the request to the City Council without date of issue of this report record your response.

6. On September 13, 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

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 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 movement of such data and which repeals Directive 95 /46/CE (General Data Protection Regulation, hereafter RGPD).

Therefore, any other limit or aspect that does not affect the personal data included in the requested information is outside the scope of this report.

The deadline for issuing this report may lead to an extension of the deadline to resolve the claim, if so agreed by the GAIP and all parties are notified before the deadline to resolve ends.

Consequently, this report is issued based on the aforementioned provisions of Law 32/2010, of October 1, of the Catalan Data Protection Authority and Law 19/2014, of December 29 , of transparency, access to public information and good governance.

In accordance with article 17.2 of Law 32/2010, this report will be published on the Authority's website once the interested parties have been notified, with the prior anonymization of personal data.

II

The data protection regulations, in accordance with what is established in articles 2.1 and 4.1) of the RGPD, apply to the treatments that are carried out on any information *"on an identified or identifiable natural person ("the interested party »); Any person whose identity can be determined, directly or indirectly, in particular by means of an identifier, such as a number, an identification number, location data, an online identifier or one or more elements of identity, shall be considered an identifiable physical person physical, physiological, genetic, psychological, economic, cultural or social of said person"*.

Article 4.2) of the RGPD considers "treatment": *any operation or set of operations carried out on personal data or sets of personal data, either by automated procedures or not, such as collection, registration, organization, structuring, conservation, adaptation or modification, extraction, consultation, use, communication by transmission, diffusion or any other form of enabling access, comparison or interconnection, limitation, deletion or destruction*".

In accordance with the provisions of article 5.1.a), any processing of personal data must be lawful, loyal and transparent in relation to the interested party and, in this sense, the RGPD establishes the need to participate in some of the legal bases of article 6.1, among which section c) provides for the assumption that the treatment "is necessary for the fulfillment of a legal obligation applicable to the person responsible for the treatment".

As can be seen from article 6.3 of the RGPD and expressly included in article 8 of the Organic Law 3/2018, of December 5, on protection of personal data and guarantee of digital rights (LOPDGDD), data processing can only be considered based on these bases legal provisions 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 acknowledges to people the 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 we are dealing with in which it is claimed, in general terms, to access certain information relating to the actions of the commission of inquiry set up to investigate facts allegedly constituting workplace harassment against the claimant worker, this information must be considered public in accordance with article 2.b) of the LTC and subject to the right of access (article 18 of the LTC), being information in their possession as a result of the exercise of their powers.

However, the right of access to public information is not absolute and can be denied or restricted for the reasons expressly established in the laws, as is the case of the limits of articles 23 and 24 of the LTC regarding the personal data.

III

Before analyzing the substantive issues, it is appropriate to refer to the position of the person who exercises the right of access to public information.

According to the documentation contained in the file sent, the initial access requests (dated June 17 and 18, 2021) were sent to the City Council by a person who identified himself as to union representative, in the name and representation of a union section and a worker. However, the claim made before the GAIP against the City Council's refusal to grant access to public information is made by the worker himself, that is to say, on an individual basis.

In view of this, in the case at hand, the claim for access will be analyzed below from the point of view of the worker concerned, and not from the point of view of the union representative.

The origin of the request for access starts, as can be seen from the documentation sent, from the complaint made by a worker to the City Council about acts allegedly constituting workplace harassment. The worker is dissatisfied with the decision of the investigation commission that was set up to investigate the facts to terminate the actions due to the impossibility of making *"a precise and objective assessment of the existence or not of signs of psychological harassment at work"*. The worker requests access to certain information relating to the actions carried out by said commission, to the documentation to which the commission has accessed in the investigation, to the proof of registration of access to said documentation, and also to know information that you have not accessed or provided to you.

A priori it seems that, at least, the requested documentation will include personal data of the reporting worker, the members of the investigation committee, as well as the person to whom the acts allegedly constituting harassment are attributed labor Based on the information available, it is not possible to determine whether there are other categories of people affected by your request.

The analysis of the substantive issue of the case before us must be based on the recognition that the regulations give to local bodies, including municipalities, in their capacity as public administration of a territorial nature, and within the sphere of its powers, the power of self-organization, in accordance with article 4.1.a) of Law 7/1985, of April 2, Regulating the Bases of the Local Government (LBRL), as well as the article 8 of Legislative Decree 2/2003, of April 28, which approves the revised Text of the Municipal and Local Government Law of Catalonia (TRLMRLC).

It should be borne in mind that, unlike the regulations relating to the operation and organization of the General Courts, as well as those relating to the Parliament of Catalonia, among others, the local regime regulations do not expressly regulate commissions of inquiry. For this purpose, its constitution can be understood as part of the function of inspection, control and supervision of the municipal government attributed to the Plenum (art. 22.2.a) of the LBRL, and 52.2.a) of the TRLMRLC), in relation to the power of self-organization.

The City Council has a protocol in relation to workplace harassment, published in the BOP on [...], in which the creation of an internal investigation commission is foreseen with the function of *"[. . .] reception of cases, collection of all information and assessment of the situation, preparation of*

the report of conclusions and proposed action and its follow-up. The Commission will also have the responsibility to [...] inform Human Resources and the Health and Safety Committee, or the prevention delegates, of everything related to any action.

Thus, the creation of the internal investigation commission could be framed in the provision of article 55 of Law 39/2015, of October 1, on the common administrative procedure of public administrations (LPAC), by which :

"1. Prior to the start of the procedure, the competent body may open a period of information or previous actions in order to know the circumstances of the concrete case and the convenience or not of starting the procedure.

2. In the case of procedures of a sanctioning nature, the previous actions will be aimed at determining, with the greatest possible precision, the facts likely to motivate the initiation of the procedure, the identification of the person or persons who could be responsible and the relevant circumstances that they concur in each other.

The previous actions will be carried out by the bodies that have assigned functions of investigation, investigation and inspection in the matter and, in the absence of these, by the person or administrative body that is determined by the competent body for the initiation or resolution of the procedure".

And, at the same time, article 275 of Decree 214/1990, of July 30, which approves the Regulations for personnel in the service of local entities, provides for the following:

"The competent body for the initiation of the disciplinary file [...] has the following powers: a) Arrange, in advance, the realization of reserved information. [...]"

It should be borne in mind that it is a consolidated jurisprudential criterion that the investigation phase prior to the start of a sanctioning or disciplinary procedure does not properly constitute an administrative procedure (among others, STSJM 471/2006, of May 24), in the sense that it consists of an administrative action tending to the verification and investigation of facts that have been brought to the attention of the public administration, with the aim of verifying aspects related to the reality of the facts or their authorship .

Thus, to the extent that the investigation carried out by the commission does not properly constitute an administrative procedure, the provision relating to the rights of those interested in the administrative procedure does not apply to this phase (art. 53 of the LPAC), such as the right to access and obtain a copy of the documents contained in the file. At the same time, it must be remembered, given that in the case before us the claimant is the reporting worker, that although the jurisprudence recognizes that the reporting person can have a legitimate interest in order to be considered interested insofar as the resolution of the administrative file can produce a positive effect in its legal sphere, or eliminate a burden or encumbrance, it must be done considering that the presentation of a complaint does not confer, by itself, the status of an interested party in the procedure, of in accordance with the provisions of article 62.5 of the LPAC.

For these reasons, the analysis of the access claim made by the worker must be done in line with LTC forecasts.

IV

At the outset, it should be noted that this Authority has previously had the opportunity to analyze the right of access formulated by a worker reporting acts allegedly constituting workplace harassment in order to obtain a copy of the recordings of the sessions of the commission investigation in which the claimant had participated (IAI Report 41/2021 available on the website <https://apdcat.gencat.cat>.)

It is worth saying, however, that in the case that is now being examined, the claim of the claimant worker is to accede to all the documentation generated by the commission of inquiry as a result of its complaint filed on facts allegedly constituting workplace harassment. Unlike the case of IAI 41/2021, in the case we are dealing with it is not documentation the preparation of which the claimant worker participated or which includes the actions of the committee in which he had participated. This particularity has the consequence that the analysis of the claim must be done in other terms with respect to IAI 41/2021.

The claimant worker has an interest in accessing all the actions carried out by the investigation commission set up due to the complaint he made for acts allegedly constituting workplace harassment and attributable to a councillor, as well as access to the documentation specific to which the commission accessed in the course of the investigation and the evidence of the access register, or know the documentation that was not provided to him.

From the perspective of the categories of people affected by the access claim, as advanced, it seems that at least among the requested documentation will be affected the personal data of the person to whom it is attributed the facts allegedly constituting labor harassment, the members of the investigation committee and the reporting worker. Based on the information available, it is not possible to determine whether there are other categories of people affected by your request, although this possibility should not be ruled out.

And, with regard to the categories of personal data affected, given the context in which the access claim is placed and the nature of the information contained in the documentation that is sought to be accessed linked to facts allegedly constituting workplace harassment, the analysis of the claim must be made based on the provisions of article 23 of the LTC, which provides for a specific regime for categories of data considered to be of special protection.

In this sense, article 23 of the LTC provides for the following:

"Requests for access to public information must be denied if the information sought contains particularly protected personal data, such as those relating to ideology, trade union affiliation, religion, beliefs, 'racial origin, health and sexual life, and also those relating to the commission of criminal or administrative offenses that do not entail a public reprimand to the offender, unless the affected party expressly consents by means of a written which must accompany the application."

This would prevent the claimant from accessing information related to administrative or criminal offenses that may have been committed or attributed to the reported person, and also to other special categories of data, such as for example the health data of any third parties that could also have been affected, unless the consent of the affected persons is counted.

This is without prejudice to the fact that, in the case at hand, it must be taken into account that certain information relating to the alleged commission of criminal or administrative offenses attributable to the alleged author of the workplace harassment will come from the same worker making the claim, which would have facility at the time of reporting the facts to the corporation, or it is information contained in documents that refer to actions in which you have participated, such as the minutes of the mediation or other meetings, if applicable. In this case, it would not seem necessary to limit access to protect this information, when the origin of the same is the person requesting access or includes information based on actions in which the claimant worker has participated .

However, with respect to other information that may be contained in the documentation to which access is sought, that refers to categories of personal data in article 23 of the LTC, and that originates from third parties other than the claimant worker himself (such as the alleged perpetrator of the reported acts or witnesses, if applicable), access to this information must be denied unless it contains the express consent of those affected.

v

With regard to the rest of personal data, it is necessary to go to the provisions of article 24 of the LTC:

"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 specific case it has to prevail over the protection of personal data or other constitutionally protected rights.

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.*

[...]."

In relation to the identification data of the members of the Commission that may be included in the requested documentation, in accordance with the provisions of the first paragraph of article 24.1 of the LTC, in principle there should not be no impediment in accessing this data.

For these purposes, it is necessary to take into account what is provided for in article 70.2 of Decree 8/2021, of February 9, on transparency and the right of access to public information, by which it is necessary to understand as merely identifying data the consisting of the name and surname, the position or position held, body and scale, the functions carried out and the telephone and postal and electronic addresses, of professional contact, referring to personnel in the service of public administrations, senior positions and management personnel of the public sector of public administrations.

On the other hand, with regard to other categories of affected persons, the claim of access requires that it be subjected to a weighting judgment in accordance with the provision of article 24.2 of the LTC, that is, a weighting prior reasoning between the public interest in disclosure and the right of the affected persons in which all the circumstances affecting each specific case are taken into account with the aim of elucidating the prevalence between the right of access and the rights of the people affected, based on the different elements listed in the aforementioned article (purpose of access, the fact that it may affect people's safety, etc.). This would affect both the data of the person making the claim, as well as the data of witnesses or other people involved.

With regard to access to their own data, the weighting must necessarily be in favor of the claimant's access to their own data under the terms of Article 15 RGPD.

Article 15 of the RGPD provides for the following:

"1. The interested party will have the right to obtain from the person in charge of the treatment confirmation of whether or not personal data that concern them are being processed and, in such case, the right to access the personal data and the following information: a) the purposes of the treatment; b) the categories of personal data in question;

c) the recipients or the categories of recipients to whom the personal data was communicated or will be communicated, in particular recipients in third parties or international organizations; d) if possible, the expected period of personal data conservation or, if not possible, the criteria used to determine this period; e) the existence of the right to request from the person in charge the rectification or suppression of personal data or the limitation of the treatment of personal data relating to the interested party, or to oppose said treatment; f) the right to present a claim before a control authority; g) when the personal data has not been obtained from the interested party, any available information about its origin; h) the existence of automated decisions, including profiling, referred to in article 22, sections 1 and 4, and, at least in such cases, significant information about the logic applied, as well as the importance and expected consequences of said treatment for the interested party.

2. [...]

3. The person responsible for the treatment will provide a copy of the personal data subject to treatment. The person in charge may charge a reasonable fee based on administrative costs for any other copy requested by the interested party. When the interested party submits the request

by electronic means, and unless it requests that it be provided in another way, the information will be provided in a commonly used electronic format.

4. The right to obtain a copy mentioned in section 3 will not negatively affect the rights and freedoms of others.”

In accordance with this provision, the claimant worker has the right to know the direct information about him that is being treated by the City Council that is included in the documentation he requests, including the origin of the information, among others aspects.

Now, from the perspective of article 24.2 of the LTC, and in relation to article 15.4 of the RGPD, it is necessary to consider whether the complaining worker would have the right to know the identity of the people who have made certain statements about him and the facts he reported, such as the witnesses, if applicable.

To this end, although article 18.2 of the LTC provides that the exercise of the right of access to public information is not conditioned on the fact that a personal interest is involved, as well as not remaining subject to the motivation or invocation of any rule, knowing the motivation of the request can be a relevant element to take into account.

According to what is contained in the claim made by the claimant employee (and whistleblower), the purpose of the intended access is to defend their employment interests and initiate legal actions.

From the perspective of the claimant worker, it should be borne in mind that article 24 of the Spanish Constitution provides that all people have the right to obtain effective protection from judges and courts in the exercise of their rights, as well as, among others , to use the evidentiary elements that are relevant for his defense.

In the case at hand, given the results of the archive derived from the action of the commission, it is clear that being able to know which actions the investigation commission has carried out, to which specific documentation he has accessed or which documentation has not been provided to him, may be relevant to know the scope of the commission's action.

Accessing this information can be considered relevant given that having collected the testimony of certain people who may be key to finding out and proving the facts, is a clearly relevant element to be able to evaluate the Commission's performance.

At the same time, knowing the origin of the personal information that affects the claimant worker may also be relevant to be able to refute certain facts or situations described by third parties, insofar as they may have influenced the decision of the investigative commission to terminate the actions given that it was not possible to establish a precise and objective assessment of the existence or not of signs of workplace harassment.

The mere fact of informing the person making the claim of the actions carried out or the documentation accessed (without accessing the content) in relation to their complaint, in principle should not lead to personal information being affected, except for the identity of the people who have acted as witnesses regarding the situation of alleged harassment that the person would have suffered

claiming On the other hand, the delivery of documents (protocols, calendars, etc.) that do not contain personal data does not affect the protection of personal data.

As we explained above, the content of the right of access provided for in article 15 RGD allows the person holding the information (in this case the person making the claim) to know not only what was said, or what information 'he has gathered that it affects him, but also who said it (source of the information).

It is clear that the disclosure of information about the identity of the people who have acted as witnesses, may involve some affectation to the extent that they are people who probably share the work environment, and that their statements may have contributed to the decision to file the complaint. The disclosure of what they may have said or not said regarding the person making the claim and the facts reported could end up negatively affecting the working relationships of these people.

For this reason, this Authority has noted the special relevance of compliance in these cases with the hearing procedure provided for in article 31 of the LTC, and know if circumstances exist personal or reasons that would justify preserving their identity.

In the case we are dealing with, however, there is no evidence that this procedure has been carried out, the result of which could justify, provided that the existence of personal circumstances or reasons to preserve the identity of any of the affected persons, the denial of access to it information However, as this Authority has previously highlighted, it is not enough to to such effect the mere manifestation of the affected person on the denial of access to his identity or other personal data, but it is necessary to prove specific circumstances that allow appreciate a clear prejudice due to the fact that the claimant can access these.

Accessing this information about the facts can also affect the person who allegedly committed the facts. But also in this case it is information that affects the person claiming, and that falls within the content of the RGD right of access, without any of the limits that may exist under the protection of article 23 RGD being appreciated . For this reason, the claimant's right of access must prevail, taking into account that the information about who harassed him (allegedly) or the circumstances in which the harassment took place, must also be considered his information.

In conclusion, both with regard to the identity of the people who have acted as witnesses and the content of their statements that are relative to the person making the claim, the weighting must necessarily be in favor of access. And this would affect not only the identity but also its manifestations that affect the person making the claim.

On the other hand, with respect to other statements that may have been made by the witnesses or other people who are not related to the person making the claim (for example aspects of their own personal or work life, or with respect to other complaints other than that of the person making the claim), the conclusion must be different, given that in this case it does not seem that the claimant's right to effective judicial protection should prevail at this time, without prejudice to the fact that at the appropriate procedural moment and through the intervention of the judicial body that corresponds, he can also use these means of proof if he considers it appropriate.

For everything that has been presented, from the perspective of the right to the protection of personal data affecting the claimant, and without prejudice to what may result from the hearing procedure of article 31 of the LTC, no it seems that the right to data protection of the alleged perpetrator or witnesses should prevail over the worker's right of access, to the extent that knowing the actions carried out by the commission could be relevant to obtaining judicial protection .

conclusion

In accordance with data protection regulations, the claimant worker (and declarant of the facts with respect to which the archive has been agreed) can access the actions carried out by the commission of investigation into facts allegedly constituting workplace harassment as well as access to the specific documentation to which it has accessed and the proof of the registration of access to said documentation, or to know the documentation that has not been provided to the commission, except for the personal information contained in this documentation that does not refer to your person.

Barcelona, September 23, 2021

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