

IAI 65/2021

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 the refusal by a City Council of the request for access to information relating to the hiring of external lawyers

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 the refusal by a City Council of the request of access to information relating to the hiring of external lawyers.

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 16, 2021, the president of a union presents an instance before the City Council in which he explains that, in accordance with the provisions of the freedom of association and transparency regulations, he requests the access to the following information:

"[...] regarding the hiring of external lawyers at the City Council: type of contract, amount of the contract, lawyer or attorney's office hired, issues handled by said attorneys or attorney's offices, reference to the type of procedure and brief indication of topic All this referring to the hiring of lawyers or external law firms since 01/01/2017.

- Reports and resolutions that have determined the hiring of external legal services for the assistance of judicial processes relating to issues related to the labor or official staff of this City Council, especially those cases in which said external legal services have been contracted in claims or other type of files of public employees and/or union organizations; all of them from 01/01/2017.

- Reports and files of the economic and treasury services related to the hiring of the aforementioned external legal services since 01/01/2017."

2. On July 20, 2021, the applicant presents a claim to the GAIP in which he states that the City Council has not responded to his request, and reproduces its terms.

3. On July 23, 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.

On August 18, 2021, the GAIP reiterates the request to the City Council without its response recorded at the date of issue of this report.

4. 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

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 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 RGD, 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".

Therefore, the data of legal entities are excluded from this scope of protection, as specified by the RGD itself, establishing that "The protection granted by the present Regulation must apply to natural persons, regardless of their nationality or place of residence, in relation to the processing of your personal data. This Regulation does not regulate the processing of personal data relating to legal entities and in particular to companies established as legal entities, including the number and form of the legal entity and its contact details" (Consideration 14).

Consequently, from the perspective of data protection regulations, there is no impediment to access to data relating to legal entities, in this case law firms organized under the form of a legal entity, or information relating to union organizations, which may appear in the documentation or information claimed.

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 RGD 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 RGD 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 RGD when so established by a rule with the rank of law.

For its part, article 86 of the RGD 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 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 (hereinafter, 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 the his

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 information related to the contracting of external legal services, it is information that must be considered public for the purposes of 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.

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, additionally, by this law".

The claimant requests the City Council to access public information basing his claim on the basis of the provisions of Organic Law 11/1985, of August 2, on trade union freedom (LOLS) and the LTC. Therefore, in accordance with the provisions of the first additional provision of the LTC, it is necessary to analyze whether through the LOLS route, and additionally the LTC, the claimant would be able to access said information.

III

At the outset, before the analysis of the substantive issue, it should be noted that although from the submitted documentation it appears that the claimant holds the position of president of a union, it is not clear whether he also holds the position of trade union representative in the City Council.

In any case, it must be borne in mind that the trade union regulations do not recognize the right to information for trade unions, or trade union sections, but that this right is reserved for trade union delegates in the terms provided for in article 10.3.1 of the LOLS:

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

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

In accordance with this precept, trade union delegates are recognized as equal, in terms of access to information, to members of the works committee or representative bodies in public administrations.

Starting from this basis, from the perspective of the right of access to the information of the trade union delegates - in the event that the applicant has this condition -, the analysis of the request

of access requires taking into account the information access regime established by Royal Legislative Decree 5/2015, of October 30, which approves the revised text of the Basic Employee Statute Law public (henceforth EBEP) as well as by the revised Text of the Workers' Statute Law, approved by Royal Legislative Decree 5/2015, of 23 October (henceforth, ET). And this without prejudice to the fact that the provisions of the transparency regulations must additionally be taken into account, in accordance with the first addition

These rules attribute to the boards or staff delegates (art. 39 EBEP), as well as to the staff delegates or Company Committee (art. 62 and 63 ET), as specific bodies representing civil servants and public workers with employment contract respectively, certain functions for the exercise of which the right of access to certain information is recognized, which could include personal data of the workers (in essence, the matters collected in articles 40 of the EBEP and 64 of the 'ET, respectively).

These forecasts may justify certain general information on the outsourcing of services that may have an impact on personnel policy or on the likely evolution of public employment (for example, volume of outsourcing or consequences of such outsourcing on evolution of the City Council staff). However, neither the EBEP nor the ET has a specific regulation that enables access to information relating to the hiring of external lawyers by the City Council in the terms requested by the claimant, the access to the reports and resolutions from which the need to contract these external legal services has been determined in matters related to the City Council's staff, or the reports and files of the economic and treasury services related to these contracts.

Consequently, it will be necessary to analyze the claimant's claim based on the regime of the right of access to public information provided for in the transparency legislation, given its supplementary applicability (DA1a. section 2 of the LTC). To this end, it must be borne in mind that 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 personal data.

IV

The claimant requests from the City Council access to information relating to the contracting of external legal services by the corporation since January 1, 2017. In particular, it requests to know with respect to each contract, the type of contract, the amount, the identification of the lawyer or law firm contracted, adjudicated files, reference to the type of procedure and a brief summary of the specific case.

It also requests access to the reports and resolutions, from January 1, 2017, from which it has been determined the need to hire these external legal services for assistance in judicial processes related to issues related to the labor staff or officials of the City Council, especially if they are matters related to claims or other files of public employees and trade unions, as well as access to the reports or files of the economic services and the treasury related to these contracts.

Although with regard to the second point (reports and resolutions on the basis of which the need to hire these services has been determined) it refers specifically to reports and files related to City Council employees or officials, the 'the breadth with which the first and third points of your request are drafted lead to the conclusion that your request does not cover only recruitments in this area but any recruitment of external legal services that the City Council has carried out.

With regard to the categories of people affected by the access claim, it seems that, at the very least, the staff of the City Council will be affected (especially the technical staff who issued the reports and resolutions related to the hiring of services), the contracted professionals who are natural persons and, where appropriate, third parties on whom the matters that have required the hiring of external legal services or even other third parties who may be involved or affected by the facts or circumstances which are the subject of controversy.

The contracting of external legal services by the City Council can respond to various needs. It can consist of advice, legal assistance or defense in some specific legal area up to a specific specific action (issuance of an opinion, a report or legal advice and assistance for the defense of the City Council or "a civil servant or public office thereof before the administrative, social, civil or criminal contentious jurisdiction).

With regard to the categories of personal data affected, given the nature and scope of the information and documentation to which access is sought, especially with regard to the claim of access to a brief summary of each case or matter in which the contracting of external legal services has been resorted to, various categories of personal data may be affected, which, a priori, may be related to any of the areas of activity of the local entity and it cannot be ruled out that include special categories of data, data linked to situations of special vulnerability, data relating to administrative or disciplinary infractions or, even, relating to criminal sanctions.

III

In relation to the information referred to the contracted professionals that may contain the information and documentation to which the claimant intends to access, the analysis of this data must be carried out in accordance with the provisions of article 24.2 of the 'LTC, which establishes the need to make a reasoned weighting between the public interest in the disclosure and the rights of the persons affected, taking into consideration, among others, the time that has passed, the purpose of the access, the guarantees that are offered, if there are minors affected or the fact that the intended access may affect the safety of people.

It should be borne in mind that in matters of administrative contracting, article 13.1 of the LTC obliges the administration to publish, among other things, the contracts signed, with the indication of the object, the amount of the tender and award, the procedure used to contract and the identity of the awardee, the duration, the number of bidders, the award criteria, the comparative table of offers and the respective scores, and also the agreements and technical reports of the process of procurement (reports justifying the award, in accordance with art

of February 9, on transparency and the right of access to public information (from now on, RLTC)).

This obligation covers all contracts, including minors, and regardless of whether the successful tenderer is a legal or natural person. Thus, there would be no problem, from the point of view of the data protection of hired professionals, to be able to access the information relating to their hiring, their identification with names and surnames, the fact of having been hired by the City Council, the type of contract, the amount of the services provided and, in principle, the object of the contract, as well as the agreements and technical reports t

This information, and also other information requested, is linked to the professional sphere of the hired professionals, and would reveal occupational and economic data. The fact of knowing that a certain lawyer provides advisory services or legal assistance to the City Council, the type of contract, the amounts that have been charged, the adjudicated files, the reference to the type of procedure, and even a reference to the specific case, does not always have to cause harm from the point of view of the privacy of the professionals affected (in some cases, it may even be a commercial argument), although it cannot be ruled out that in some case may generate some type of damage.

On the other hand, taking into account the general purpose of the transparency regulations, that is to say, to establish a system of relationship between the people and the public administration and the other obliged subjects, based on the knowledge of the public activity, the incentive of citizen participation, the improvement of the quality of public information and administrative management and the guarantee of accountability and responsibility in public management (article 1.2 LTC), this information may be relevant to evaluate administrative management in relation to the contracting of external legal services, insofar as

Taking this into consideration, and the fact that public access to the identity of the successful tenderer is already provided for in the transparency legislation through active advertising, it does not seem that there could be any inconvenience in facilitating access to the claiming the requested information that affects the professionals hired who are natural persons for the provision of legal advice or legal assistance to the City Council.

Warning, however, that the principle of data minimization (Article 5.1 c) RGPD) requires that the data subjected to treatment are adequate, relevant and limited to what is necessary in relation to the purposes for which they are treated. In application of this principle, it would be necessary to omit beforehand, those identifying data (such as the NIF, address or other contact data) as well as other personal data that, beyond the identification of the successful tenderer, may be included and are unnecessary for achieve the goal of transparency pursu

IV

With regard to the data relating to the people with whom the City Council has maintained or maintains a dispute (including City Council staff who may be affected by any of the actions commissioned) that may be affected by the information alone tendered, it must be taken into account that, as has been advanced, the recruitment may respond to several

needs and affect different subjects that, a priori, may be related to any of the areas of activity of the local entity, which means that we cannot rule out that it affects several categories of data, including special categories of data, among others .

The definition of the object of the contract, the reports justifying the outsourcing of the service and the reports and other documents that are part of the management of the files, may contain information that affects third parties. This would happen, for example, if the definition of the object of the contract includes the data (identification and about the matter in question) of the natural person who is the opposing party to the City Council in a judicial process.

In this case, it does not seem that active advertising allows this type of information to be made public, nor that it should be possible to access it through the right of access to public information, since in the weighting that obliges to make article 24.2 LTC the right to data protection in principle must prevail over access.

It should be borne in mind that 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 no rule, but knowing the motivation of the request can be a relevant element to take into account when making the weighting required.

The claimant, when requesting access, does not expressly state the purpose of knowing the information and documentation requested, apart from basing his request on the provisions of the LOLS and the LTC.

Notwithstanding this, given the purpose of the transparency law, having information about the number of outsourcings, the amount, the matter (generically or by category), or the selected lawyer may be relevant with this control purpose of the administrative action. But on the other hand, the information relating to the third parties affected by the outsourced actions and the content of the disputes becomes irrelevant. And, with more reason, in the event that the person requesting the information is a union representative.

Accessing the personal information of third parties with whom the local corporation maintains a dispute may affect several personal spheres. It should be noted that the request does not specify that the information you seek to access must be on certain subjects, and at the same time, it should be noted that this information is requested to be from January 1 2017 until the time of the application presented to the City Council.

Thus, taking into consideration the scope of the request, it is clear that having this information would allow the claimant to access multiple data that would affect a plurality of indeterminate people, simultaneously affecting different personal spheres (social, professional or even and everything, intimate).

Having this information could allow the City Council to learn about various aspects such as, in the case of City Council staff, disagreements related to working conditions, permits, or other aspects of working life, which could have negative effects on their work and professional relationships, even on their privacy, or, in the case of other third parties, disclosure of aspects that affect their social sphere that could harm

their personal relationships, revealing patrimonial data, harming potential professional relationships, revealing a vulnerable social situation, etc.

Therefore, given the general scope of the request, and in accordance with what is provided for by the principle of minimization of personal data (art. 5.1.c of the RGPD) from the perspective of data protection it is necessary prevent this information from including information that allows the identification of physical persons with whom the dispute is ongoing.

At this point, it should be noted that a person can be identified from any information that allows their identity to be determined, directly or indirectly.

Accessing this information without revealing the identity of the people with whom the City Council has maintained, or maintains, a controversy would not prevent the achievement of the purpose of transparency, to the extent that it would allow the performance of the local corporation to be known and assessed the different casuistics.

For this reason, this Authority considers that, in general, with regard to information relating to affected third parties, it may be sufficient in these cases to report the number of judicial proceedings and the matter (indicating, for example, whether it is 'a file in matters of personnel, town planning, subsidies, etc.).

With more reason, it is necessary to exclude this information when it may affect any of the categories of specially protected data provided for in article 23 LTC.

Article 23 of the LTC, in relation to specially protected personal data, provides 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".

On the other hand, reference should also be made to article 15.1 of Law 19/2013, of 9 December, on transparency, access to public information and good governance, which provides:

"1. If the requested information contains personal data that reveal the ideology, trade union affiliation, religion or beliefs, access can only be authorized if there is the express and written consent of the affected person, unless said affected person had made it manifestly public the data before access was requested.

If the information includes personal data that refers to racial origin, health or sex life, includes genetic or biometric data or contains data related to the commission of criminal or administrative offenses that did not lead to a public reprimand to the offender, access only it can be authorized if the express consent of the affected person is counted or if the latter is protected by a rule with the force of law".

The joint interpretation of articles 23 LTC and 15 of Law 19/2013 leads us to conclude that access to personal information related to these categories of data would only be authorized when the express consent of the person affected or, in relation to certain data, there is a rule with the rank of law that the party or the affected party had publicly expressed the information prior to access.

this without prejudice to the fact that, in exceptional cases, such as when the City Council has assumed the expenditure for the defense of employees or elected officials of the corporation, in which case it may be relevant to know this circumstance.

Therefore, following the criteria set out in the IAI 22/2017 and IAI 17/2019 reports, available on the Authority's website www.apdcat.cat, a solution that could make the provisions of article 23 LTC and 15.1 LT compatible with the right to the protection of the personal data of the affected persons, it could be not to facilitate the identity of the persons affected by criminal proceedings or administrative infractions, but simply to facilitate their status as elected officials or City Council staff, and on the other hand, information on whether these are crimes against the Administration Public (Title XIX of the Penal Code) in relation to the City Council, in which case there could be a relevant conflict of interest.

It is possible that given the nature of the facts (criminal or disciplinary proceedings against an elected official or against a municipal worker) the population as a whole has already been able to obtain information through other means about its existence and about the identity of the people affected. In these cases, it could be relatively easy to relate the information obtained through the exercise of the right of access to public information, with the identity of these people already known beforehand. It may certainly be so, but in this case it would not be the information provided through the right of access that would allow information related to the commission of infringements to be known, but simply with the fact that the defense had been in charge of

However, the information about the facts that could have given rise to the administrative infraction, misdemeanor or crime in question, or about its typification, would go beyond what can be understood to be the subject of the contract for the purposes of transparency in the control and management of public resources. Therefore, access to said information would not have the authorization provided for in article 13.1 LTC in relation to articles 23 LTC and 15.1 of State Law 1

On the other hand, in the event that the claimant has the status of union delegate or staff representative, it must be taken into account that as such the regulations recognize the staff representatives' right to be informed of the sanctions imposed for very serious offenses (art. 40.1.c) of the EBEP and art. 64.4.c) of the ET), and in the case of union delegates, article 10.3.3 of the LOLS recognizes their right to "be heard by the company prior to the adoption of measures of a collective nature that affect the workers in general and those affiliated to their union in particular, and especially in the dismissals and sanctions of these latter".

In these cases, it would not be justified to deny access to the information that you would have the right to know by way of labor regulations. However, it must be emphasized that from the information available when issuing this report, it is not clear whether the claimant holds the status of union delegate or representative of the City Council staff.

For all of this, while access to third-party information that refers to categories of data collected in article 23 of the LTC must be denied, unless one of the cases that exclude access prohibition is met, the claimant could be provided with information on whether the object relates to an elected office or other staff of the corporation, or to another third party, and on the other hand, information on the type of controversy. In other words, it is necessary to limit access to any other information about the facts, specific conduct or typifications of the infractions, crimes or misdemeanors on which the specific judicial cases are concerned.

v

Finally, among the categories of people affected by the access request will also be the technical staff who issued the requested reports and resolutions. Regarding your data, take into account article 24.1 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.

Based on the provisions of this article, in principle there should be no impediment in giving access to the claimant. To this end, it is necessary to take into account the provisions of article 70.2 of Decree 8/2021, of February 9, on transparency and the right of access to public information (from now on, RLTC), by which it is necessary to understand as merely identifying data those consisting of the name and surname, the position or position held, body and scale, the functions performed and the telephone and addresses, postal and electronic, of professional contact, referred to the staff at the service of the public administrations, senior officials and managerial staff of the public sector of public administrations.

conclusion

The data protection regulations do not prevent the claimant from accessing information related to the contracting of external legal services, in the terms provided for in the active advertising regime (art. 13.1 of the LTC), with the exception of personal information relating to people who have had or are having a dispute with the City Council (including staff) and other third parties who may be involved or affected by the facts or circumstances that are the subject of the dispute.

Barcelona, October 7, 2021