

IAI 68/2021

**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 an environmental administration body for the denial of access to the files containing the water pollution by the chemical industries of the petrochemical estates in Camp de Tarragona since 1975 and up to the present day.**

The Commission for Guaranteeing the Right of Access to Public Information (GAIP) asks the Authority Catalan Data Protection Authority (APDCAT) to issue a report on the claim filed against an environmental administration body for the denial of access to the files on water pollution (maritime, rivers, lakes, underground, etc.) by the chemical industries of the petrochemical estates in Camp de Tarragona from 1975 to the present day

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 4, 2021, a request from a citizen, in his capacity as a journalist and resident of the city of Tarragona, was submitted in the registry of the Generalitat of Catalonia, for the which asks the body to consult the files showing water pollution (sea, rivers, lakes, underground, etc.) by the chemical industries of the petrochemical estates in Camp de Tarragona from 1975 until nowadays.
2. On September 7, 2021, the information requester 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 files, in which states that "(...) asked for an extension to deliver the documentation and that this has been fully complied with and the documentation has not arrived":
3. On September 10, 2021, the GAIP requests the organization to issue a report on the claim submitted, identify the third parties affected by the access, send the completed file to which it refers and indicate the person or persons who will represent you at the mediation session.
4. On October 4, 2021, the organization issues a report regarding the access request in which it states that at first it was decided to limit the information regarding which it would facilitate access, consisting of the sanctioning files and, of these "only those that had effectively ended definitively resolved with an effective sanction", and that subsequently, given the volume of information requested, an extension of the deadline to resolve the case was agreed. However, it is noted that it is aware of the delay in the resolution of the access file, which is justified by the complexity of the tasks that must be carried out to

respond to the request that had to cover all the sanctioning files. First of all, because of the complexity of the work required to obtain the requested information as well as the tasks that would have to be performed, afterwards, to guarantee access to the requested documentation.

With regard to these tasks, he emphasizes that once the files are in digital format "it is necessary to subject each of them to an analysis process to detect the presence of personal or other data that are subject to protection by law, and then apply concealment techniques in order to prevent access to this data by third parties".

5. On October 18, 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**

I

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

Article 42.8 of Law 19/2014, of December 29, on transparency, access to public information and good governance, which regulates the claim against resolutions on access to public information, establishes that if the refusal has been based on the protection of personal data, the Commission must issue a report to the Catalan Data Protection Authority, which must be issued within fifteen days.

For this reason, this report is issued exclusively with regard to the assessment of the incidence that the requested access may have with respect to the personal information of the persons affected, understood as any information about an identified or identifiable natural person, directly or indirectly, in particular through an identifier, such as a name, an identification number, location data, an online identifier or one or more elements of physical, physiological, genetic, psychological, economic, cultural or social 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 claimant requests access to the "files containing the water pollution by the chemical industries of the petrochemical estates in Camp de Tarragona from 1975 to the present day".

Although it is not known exactly what the claimant is referring to when he requests the files held by the body where the water pollution is recorded, it can be anticipated that the body may have information related to the water pollution as a result of different types of actions within its competences, such as discharge authorization files, periodic controls of activities, water quality controls, sanctioning files, etc.

From the perspective of data protection regulations, it is necessary to start from the basis that the RGPD, in accordance with its articles 2 and 4.1, is applicable to the treatments that are carried out on personal data understood as any 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).

It must be taken into consideration that the data of legal entities are excluded from the scope of protection of the RGPD, as specified by the RGPD itself, by establishing that "The protection granted by the present Regulation must be applied to natural persons, regardless of your 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.

(Recital 14)

Thus, the regulations for the protection of personal data will be relevant with respect to the information referred to companies that are natural persons (individual entrepreneurs) owners of the chemical industries of the petrochemical estates of Camp de Tarragona that are natural persons that have been the subject of an action for part of the environmental administration as a result of water pollution.

On the other hand, the claimed information referring to companies that are legal entities remains excluded from the protection scope of the personal data protection regulations. Therefore, from

from the point of view of personal data protection regulations, there would be no problem in being able to access it.

However, in his request, the applicant expressly states that he wants to access the actions carried out as a result of the water pollution. Therefore, it seems that what he wants is to be given the complete files relating to these actions. It can be foreseen that these files may not only contain data on the legal entities responsible for the events but also on natural persons acting on behalf of the legal entities. Similarly, the files may also include data from third parties, such as the public employees in charge of processing the files (inspectors, instructors, competent public officials, etc.), as well as third parties who may have intervened as whistleblowers, witnesses, etc. . In the event that they are natural persons, the processing of this personal information would be protected by data protection regulations.

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, access by the requesting person to the completed files claimed would involve processing personal data 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 claimant's access to personal data that may contain the information requested on the basis of the fulfillment of a legal obligation by the organization (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).

For the purposes of article 2.b) of the LTC), public information is "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".

It should be taken into account, however, that 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, with additional character, by this law.

The environment is a matter with a special regime of access, regulated mainly by Law 27/2006, of 18 July, which regulates the rights of access to information, public participation and access to justice in environmental matters (hereafter LAIA).

The application of this specific regulation to the case at hand depends, basically, on whether the claimed information must be considered included within the concept of environmental information, for the purposes of the LAIA.

Article 2.3 of the LAIA defines "environmental information" in the following terms:

"3. Environmental information: all information in written, visual, audio, electronic or any other form regarding the following issues:

a) The state of the elements of the environment, such as air and atmosphere, water, soil, land, landscapes and natural spaces, including wetlands and marine and coastal areas, biological diversity and its components, including genetically modified organisms; and the interaction between these elements.

b) The factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, spills and other releases into the environment, that affect or may affect the elements of the environment mentioned in letter a) .

c) Measures, including administrative measures, such as policies, rules, plans, programs, environmental agreements and activities that affect or may affect the elements and factors mentioned in letters a) and b), as well as the activities or the measures intended to protect these elements.

d) Reports on the execution of environmental legislation.

e) The analyzes of the cost-benefit relationship and other analyzes and assumptions of an economic nature used in decision-making regarding the measures and activities cited in letter c), and

f) The state of health and safety of people, including, as the case may be, contamination of the food chain, human life conditions, assets of historical, cultural and artistic heritage and constructions, when they are or may be affected by the state

of the elements of the environment cited in letter a) or, through those elements, by any of the extremes cited in letters b) and c).”

From the literal tenor of the precept it can be inferred that the legislator wanted to give the concept of information environmental in a broad sense, which, in accordance with the jurisprudence of the TJCE (for all, the STJCE of June 17, 1998, case 321/96, Mecklenburg), would cover "any information relating to the state of the different elements of the environment that are mentioned there (in article 2.a) of the Directive), as well as activities or measures that may affect or protect the state of said elements, including administrative measures and environmental management programs. (...) using the term "measures" only to specify that among the acts contemplated by the Directive must be included all forms of exercise of administrative activity".

In view of this broad interpretation of the European Court of Justice, it seems that the information relating to the files processed by the body in relation to water pollution by the chemical industries of the petrochemical estates of Camp de Tarragona, could consider- environmental information to which the special access regime regulated in the LAIA applies, without prejudice to the fact that, where not provided for by this law, the LTC would additionally apply, in accordance with its first Additional Provision.

### III

Article 3 of the LAIA establishes that anyone can access environmental information held by public authorities or that of other subjects on their behalf, without being obliged to declare a specific interest.

The right of access to environmental information is not configured as an absolute right of the applicant, but, as established in article 13 of the LAIA, is subject to a regime of exceptions that the public authority can invoke to deny the request. Specifically, with regard to personal data, section 2.f) provides that requests may be denied if the disclosure of the requested information may negatively affect "the confidential character of the personal data, as y as regulated in Organic Law 15/1999, of December 13, on the Protection of Personal Data, provided that the person concerned has not consented to its treatment or disclosure." (article 13.2.f). This reference to the regulations on the protection of personal data must be understood today as referring to the RGPD and Organic Law 3/2018, of December 5, on the protection of personal data and guarantee of digital rights (LOPDGDD) and RGPD

However, LAIA itself expressly requires that the reasons for denying access to environmental information be interpreted restrictively and that, in each specific case, a weighting be carried out between the public interest that would be served with the disclosure of the information and the interest that would be served by denying access to that information (article 13.4).

As stated in the report issued by the organization, the requested information includes sanctioning files processed at the petrochemical companies in the Tarragona countryside. However, the organization may have information on water discharges as a result of other types of records such as records relating to discharge authorizations, periodic controls of activities, water quality controls, etc. . Precisely the LAIA

expressly identifies as environmental information the "emissions, discharges and other releases in the environment, which affect or may affect the elements of the environment mentioned in letter a" and one of its pillars is to allow citizens to access the environmental information. In this sense, article 13.5 of the LAIA provides that the authorities cannot rely on the reasons provided for in letters a), d), f), g) and h) of article 13.2, to deny a single request for information related to emissions in the environment (article 13.5 LAIA).

On the other hand, the information relating to emissions and authorizations is part of the information that article 7 of the LAIA expressly provides that must be the subject of publication when it establishes that:

The information that is disseminated will be updated, if appropriate, and will include, as a minimum, the following points:

(...)

4. The reports on the state of the environment referred to in article 8.

5. The data or summaries of the data derived from the monitoring of activities that affect or may affect the environment.

6. Authorizations with a significant effect on the environment and environmental agreements. Otherwise, the reference to the place where the information can be requested or found in accordance with article 5.

7. Environmental impact studies and risk assessments related to the elements of the environment mentioned in article 2.3.a). Otherwise, a reference to the place where the information can be requested or found in accordance with the provisions of article 5".

Therefore, there should be no inconvenience from the perspective of data protection regulations in providing the claimant with the information that the organization has regarding the authorizations of discharges with a significant effect on the environment, as well as information about data derived from the monitoring of activities that may affect the environment, etc.

#### IV

A different matter is the information relating to the sanctioning files and the information files available to the organization, access to which is analyzed below.

From the perspective of data protection regulations, access to environmental information will have to be restricted when it affects data considered particularly sensitive, under the terms of article 9 of the RGPD (data that reveal the origin ethnic or racial, political opinions, religious or philosophical convictions or trade union affiliation, genetic data, biometric data intended to uniquely identify a natural person, data relating to health or data relating to sexual life or orientation sexual information of a natural person), or other data that, despite not being included in this category, count in Spanish legislation with

a reinforced system of protection such as, taking into account the case at hand, the data relating to infringements and administrative or criminal sanctions.

As for the elements to be taken into consideration in the weighing between the public interest in access to environmental information and the protection of personal data regarding the persons responsible in the sanctioning proceedings instructed by the body, it is necessary to bear in mind consideration that information relating to administrative or criminal offenses and sanctions is subject to a reinforced system of protection.

This special protection derives from article 27 of LOPDGDD which establishes:

"1. Pursuant to Article 86 of Regulation (EU) 2016/679, the processing of data related to administrative infractions and sanctions, including the maintenance of records related to them, will require:

a) That those responsible for said treatments are the competent bodies for the instruction of the sanctioning procedure, for the declaration of the infractions or the imposition of the sanctions. b) That the treatment is limited to the data strictly necessary for the purpose pursued by that.

2. When any of the conditions provided for in the previous section are not met, the data treatments referred to infractions and administrative sanctions must have the consent of the interested party or be authorized by a rule with the force of law, in which they will be regulated, where applicable, additional guarantees for the rights and freedoms of those affected.

3. Apart from the cases indicated in the previous sections, the processing of data related to infractions and administrative sanctions will only be possible when they are carried out by lawyers and attorneys and have the purpose of collecting the information provided by their clients for the exercise of their function."

This protection is also included in the regulations on access to public information (although it is not directly applicable in the present case). Thus article 23 of the LTC establishes that "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 sex 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 to it by means of a written document that must accompany the request."

It is worth saying that this protection must be extended to those investigative actions that are part of a previous information carried out by the competent administration and that have not ended in a disciplinary file. In these cases, as this Authority has previously highlighted, the association of the natural person with facts likely to be the subject of a disciplinary file that has finally been filed have an impact on their



personal and professional reputation that also require, and with more reason, special protection.

In the case at hand, it should be noted that there is no evidence that the consent of the potentially affected persons has been provided so that said information can be disclosed (article 13.2.f) LAIA). For this reason, it will be necessary to exclude access to files of a disciplinary nature or information prior to a disciplinary file.

However, it must be taken into account that the specific legislation on the environment establishes sanctions that involve the publication of the offender's data, as would be the case, for example, of the very serious offenses specified in Law 20/2009, of December 4, on prevention and environmental control of activities, which in its article 83 provides that in the case of very serious infractions of those typified in its article 80 (relating to the exercise of activities without the corresponding authorizations or breaching the conditions imposed when damage to the environment has occurred) may result in the imposition of a penalty consisting of the "Publication, using the means deemed appropriate, of the penalties imposed, once they have acquired determination by administrative or, where applicable, jurisdictional procedure, and also the name, surnames or denomination or company name of the natural or legal persons responsible and the nature and nature of the infractions tions" (article 83.a).5).

Therefore, access to the environmental information requested by the claimant referring to natural persons as responsible or presumed responsible for water pollution violations, should be limited on the basis of what is provided for in article 13.2.f) of the LAIA and the data protection legislation (article 10 RGPD and article 27 LOPDGDD), except in the case of disciplinary proceedings in which a sanction has been imposed, for a very serious infringement, consisting the publication of the data of the person responsible for the infringement, since in this case the regulations governing this provision would be the enabling legal norm for its communication in the terms of article 27.2 of LOPDGDD. In those cases where the penalty of publication has been imposed, the information relating to the offense committed and the penalty imposed could be given, identifying the person responsible although access to the complete file will have to be excluded.

On the other hand, from the point of view of the public interest in access to this environmental information, there is no denying the interest that can be had in knowing if the environmental administration has instituted disciplinary proceedings for pollution in the environment. However, this purpose could also be achieved without infringing the special protection of the personal data of those responsible for administrative or criminal offenses provided for by the analyzed regulations, if the information was facilitated in such a way that the affected persons are not identifiable.

In this sense, the data protection regulations would not prevent the provision of aggregated information on the number of disciplinary proceedings processed in a certain area or period, as long as the affected individuals are not identifiable.

To determine if a natural person is identifiable "must be taken into account all the means, such as singularization, that can reasonably be used by the controller or any other person to directly or indirectly identify the natural person.

To determine whether there is a reasonable probability that means will be used to identify a natural person, all objective factors must be taken into account, such as costs and

time necessary for identification, taking into account both the technology available at the time of treatment and technological advances" (consideration 26 RGPD).

v

With regard to the information relating to third parties that may be contained in the non-sanctioning files or sanctioning legal entities, it can be foreseen that the requested files contain personal data of the public employees in charge of processing the files (inspectors, instructors, competent public positions, etc.), but also of natural persons who have acted in the name and representation of the companies as well as third parties who have been able to intervene as complainants, witnesses etc. In order to determine whether this personal information can be accessed, it will be necessary to weigh the interests at stake provided for in article 14.4 of the LAIA. This section does not refer to the data of third parties that may appear in sanctioning files processed for natural persons, because in this case, as we have already explained, access to this type of file would have to be excluded.

As stated, in accordance with Article 13.4 of the LAIA, the grounds for refusal provided must be interpreted restrictively. To this end, it is necessary to carry out a weighting in each specific case between the public interest that would be served by disclosing the information, with the interest that would be served by denying it. Regarding the data of public employees that may appear in the requested information, when making the weighting it must be taken into consideration that the identification of these is carried out within the framework of their relationship and the services they provide in the public administration, in such a way that access to their data is directly related to their public functions.

It does not seem that the disclosure of this type of information entails, in general, a special impact on the right to data protection, taking into account the duty of public employees to identify themselves in the files in which they intervene.

Therefore, apart from exceptional cases in which it is necessary to preserve the privacy of these due to the personal situation that any of these workers has revealed, in principle there should be no impediment to facilitate access to information that contains merely identifying data (name and surname) of employees or public officials.

The information requested may also contain information about the natural persons who have acted in the procedures on behalf of the legal entity.

In this case, in order to weigh up the public interests at stake, it must be taken into account that given the extensive time period covered by the request (since 1975) it can be predicted that a significant number of these representatives no longer provide their services in those companies. From the point of view of the protection of the privacy of these people, the fact that they may be related to disciplinary or investigative files in relation to the company in which they may no longer provide services, may cause damage in the his professional and even personal sphere.

On the other hand, the public interest in the disclosure of this information from an environmental point of view is very low and, on the other hand, the disclosure of this information may have negative effects on your privacy, insofar as it is seen related to facts that have to do with the commission of administrative infractions or that may even have resulted in criminal responsibilities with respect to legal entities, in which their participation has been solely as legal representatives.

Therefore, the identification data of these third parties that appear in the files as representatives of the legal entities given the limited public significance of the information for environmental purposes and the harm to their privacy must be preserved from their disclosure

Finally, the claimed files may contain information from third parties who, for some reason, have intervened in the file, for example as complainants, interested parties or witnesses.

In principle, it does not seem that the information relating to these people that may appear incidentally in the requested files is relevant to guarantee the public interest in access to environmental information. On the other hand, it can be foreseen that the people who bring to the attention of the administration facts that may constitute an administrative or criminal offense, or who intervene in the procedure as witnesses, do so with expectations of privacy for so that your personal information is not disclosed to third parties. On the contrary, the disclosure of their identity could have negative consequences for these people both in their professional and personal spheres.

Therefore, with regard to this information, it should be omitted from the requested files.

## **conclusion**

From the perspective of the regulations for the protection of personal data, the claimant can be provided with the information available to the body relating to the authorizations of discharges with a significant effect on the environment, as well as information on the derived data the monitoring of activities that may affect the environment, etc.

The claimant's access to the sanctioning files available to the organization must be excluded on the pollution of waters in which the person responsible for the pollution is a natural person, although it is possible to give access to the offense committed, the penalty imposed and the offender subject, when a publication penalty has been imposed for a very serious offence. The data protection regulations do not prevent access to information on sanctions on legal entities or aggregate information on those imposed on natural persons that does not allow them to be identified.

With regard to the data of third parties that may appear in the files that can be accessed, it is necessary to anonymize the personal data of third parties (legal representatives, complainants or witnesses) that may appear there, except for the people who have intervened for reason of his charge.

Barcelona, November 4, 2021

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