

IAI 70/2021

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 lack of response of a City Council to the request for access to a file, by the person making the complaint

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 lack of response of a City Council to the request for access to a file, by the reporting person.

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 March 2, 2021, a letter from a staff delegate was submitted to the general registry of a City Council, in which he explained that the staff delegates had submitted several requests and complaints, since from October 2020 until the moment of presentation of the letter, related to events that they consider to be infringing on their rights of action and union representation, including also complaints of workplace harassment, allegedly committed by members of the local corporation

In this letter, the personnel representative explains that the events described have also affected him personally and he reports being the victim of workplace harassment. Request the activation of the workplace harassment protocol.

2. On March 5, 2021, the City Council notifies the delegate of the receipt of the complaint and requests the clarification, concreteness and precision of the facts that it considers to constitute workplace harassment, the date and time of each of them, the people involved, the witnesses and the evidence that determine each situation.

3. On March 9, 2021, the complainant responds to the City Council's request and sets out the chronology of the events reported, referring to those allegedly responsible for each of them and the witnesses.

In summary, the complainant exposes conduct allegedly committed by multiple people, such as the mayoress, the local police chief, etc. which he considers to have violated his right to freedom of association, to union representation and action, and which he considers constitutive of labor harassment.

4. On May 31, 2021, the complainant presents an appeal for reinstatement against the minutes of the first meeting of the commission of inquiry for the treatment of harassment situations of the City Council, considering that certain circumstances have occurred that it considers irregular in relation to the procedure followed in the investigation of the facts it has denounced, the constitution of the commission and the agreement to challenge one of the members, the terms of the procedure, among other issues.

Requests the declaration of nullity of the minutes of the meeting of the investigation committee, and the view and copy of the administrative file corresponding to his complaint of workplace harassment.

5. On June 18, 2021, the complainant presents a new letter to the City Council in which he makes a complaint related to the recusal agreement of another member of the investigation commission, and promotes the recusal of other members of the investigation commission set up to deal with the alleged situation of harassment suffered. Repeat the request to view and copy the file.

6. On July 24, 2021, the applicant presents to the GAIP a claim in which he states that the City Council has not responded to his request for access to the file, and reiterates his pretense He bases the claim on being *"the interested party/complainant of the file"*.

7. On July 29, 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 23, 2021 and September 8, 2021, the GAIP reiterates the request to the City Council given the lack of response to the request.

8. On September 20, 2021, the GAIP contacted the City Council by email requesting that a response be given to the requirements in relation to the claim lodged. On September 23, 2021, the GAIP attached by email the communications sent to the City Council up to that date.

On September 24, 2021, the City Council responds to the GAIP emails informing of their receipt and the start of their processing in order to respond to their requests.

9. On October 6, 2021, the GAIP addresses a request for additional information to the applicant regarding the content of the file to which access is requested, and to state whether is part of it and, if so, in what capacity.

On the same date, the GAIP reiterates the request addressed to the City Council in relation to a report on the antecedents, foundations, etc. At the time of issuing this report, there is no response from the City Council.

10. On October 7, 2021, the applicant sends to the GAIP the documentation he has in relation to the processing of the file, and from which a large part of the

information relating to the antecedents of the claim, and which have been exposed up to this point in this report.

11. On October 18, 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 the public information and good governance.

Legal Foundations

I

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

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

For this reason, this report is issued exclusively with regard to the assessment of the incidence that the requested access may have with respect to the personal information of the persons affected, understood as any information about an identified or identifiable natural person, directly or indirectly, in particular 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"*.

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

As can be seen from article 6.3 of the RGPD and expressly included in article 8 of 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 States members that apply 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 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 at hand, in which access is requested to the file relating to the actions of the commission of inquiry set up to investigate facts allegedly constituting workplace harassment, by the whistleblower himself, this information 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), as it is information in their possession as a result of the exercise of their skills

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".

On the basis of this provision, and to the extent that the claimant has the status of a trade union delegate, it is first necessary to analyze whether through Organic Law 11/1985, of August 2, on trade union freedom (LOLS) , and additionally the LTC, would be able to access the requested information.

III

Based on the information contained in the file sent, it appears that the origin of the access claim stems from the complaint made by the claimant, a staff delegate of the City Council, in relation to events allegedly constituting harassment labor. In summary, the claimant is dissatisfied with several circumstances related to the constitution of the commission for the treatment of harassment situations, the procedure followed for the investigation of the facts, among other issues, considering that there is a lack of transparency on the part of the City Council, and requests access to the file relating to the investigation of the facts reported in the letter of May 31, 2021.

Article 10.3.1 of the LOLS recognizes the right to information for union delegates in the following terms:

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

Thus, the LOLS recognizes the equalization of trade union delegates, in terms of access to information, with members of the works committee or representative bodies in public administrations.

Starting from this basis, from the perspective of the right of access of union delegates, the analysis of the access request requires taking into account the regime established by Royal Legislative Decree 5/2015, of October 30 , which approves the revised text of the Law on the Basic Statute of the Public Employee (hereafter EBEP) as well as the revised text of the Law on the Statute of Workers, approved by Royal Legislative Decree 5/2015 , of October 23 (hereinafter, 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 additional provision of the LTC.

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 of

representation of civil servants and public workers with employment contracts 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 could justify certain information on the sanctions imposed for very serious offenses (art. 40.1.c) of the EBEP and 64.4.c) of the ET) or the hearing in cases of dismissal or sanctions for members of the trade union delegate (art. 10.3.3 of the LOLS).

However, there is no specific regulation that enables access to the investigation file of reported facts allegedly constituting workplace harassment.

Consequently, from the perspective of the claimant's trade union representative status, the regulations do not enable access to the requested information, and the claim must be analyzed from the regime of the right of access to the public information provided for by the transparency legislation, given its supplementary applicability (DA1a. section 2 of the LTC).

It should 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 to personal data.

IV

According to what can be seen from the documentation sent, it seems that, from the perspective of the categories of people affected by the claim for access to the file, at least the personal data of the people in the to which the facts allegedly constituting labor harassment are attributed, the members of the investigation commission, the person making the complaint and, where applicable, the witnesses to the facts that have been reported.

And, with regard to the categories of personal data affected, taking into consideration the nature of the facts reported, related to facts allegedly constituting workplace harassment, the claim of access affects both specially protected personal data to which it refers article 23 of the LTC - in particular, those relating to the commission of criminal or administrative offenses that do not entail a public reprimand to the offender - as well as other categories of data subject to the regime provided for in the article 24 of the LTC, such as the data of the members of the investigation commission or that relating to the actions related to the promotion and recusal agreement of some of the members, information related to the witnesses and their manifestations, among others .

In relation to specially protected personal data, article 23 of the LTC provides that requests for access to public information containing data of this category must be denied, unless the affected person consent expressly by means of a writing that must accompany the request. Thus, to the extent that in the case at hand there is no said consent, access to the information that may be contained in the documentation to which it is intended to be accessed, that refers to these categories of personal data, must be denied

Regarding the other categories of personal data, it is necessary to refer 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.

[...]."

Pursuant to the provisions of this article, the intended access must be subject to a prior reasoned weighting between the public interest in disclosure and the right of the affected persons in which all the circumstances affecting each specific case with the aim of elucidating the prevalence between the right of access and the rights of the affected persons, taking as a basis the different elements listed in the aforementioned article (purpose of the access, the fact that it may affect the safety of people, etc.).

As can be seen from the documentation sent, and especially from the terms in which the claimant formulates the initial access request on May 31, 2021, it seems that the claim originates from considering, the claimant, that certain irregularities have occurred in the processing of the file which he links to an alleged lack of transparency on the part of the City Council and which cause him a situation of legal defencelessness. In this sense, it can be understood that the purpose of the request is to be able to defend its rights and interests, which is why it requires accessing and verifying the actions of the City Council in its processing.

However, it is clear that the disclosure of information about the identity of the people affected by the claim may affect them in various personal spheres, be it professional, social or even their privacy, especially regarding the witnesses in relation to the information they have exposed in the investigation of the reported facts.

On the other hand, in the case at hand, the fact that, according to what appears from the submitted documentation, the facts allegedly constituting labor harassment reported by the claimant is being investigated by an investigation commission is relevant the framework of a prior information phase.

This Authority has previously had the opportunity to analyze the right of access to a file of reserved information (among others, in opinion CNS 14/2018 and CNS 13/2021 or in the IAI report 10/2020, available on the website <https://apdcat.gencat.cat>).

In this sense, it should be borne in mind that the reserved information file is part of the provision of article 55 of Law 39/2015, of October 1, on the common administrative procedure of public administrations (LPAC), whereby:

"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. [...]"

These research actions are fundamentally aimed at determining, with the major possible precision, the facts likely to motivate the initiation of the procedure, the identification of the person or persons who may be responsible and the relevant circumstances concurrent

It is a consolidated jurisprudential criterion that the information 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 in 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 in accordance with the jurisprudence the prior information phase is not an administrative procedure, in the case at hand the access regime provided for in article 53.1.a) of the LPAC recognized to those interested in the administrative procedures. I even if it was an administrative procedure, it must be borne in mind that the fact that the claimant is the complainant of the facts, article 62.5 of the LPAC provides that the presentation of the complaint does not confer, by itself, the condition of 'interested in the procedure.

On the other hand, it is also a jurisprudential criterion that, to the extent that the information phase prior to the start of a sanctioning or disciplinary procedure has a reserved nature (its knowledge can lead to clear damage to the result of the same), this prevents that

during its processing, access to its content can be facilitated (among others, STS 21/2018, of February 15).

And this would affect both access to third-party information that may be included in the file and the claimant's own information that may be included.

It should be taken into account, in this sense, that the right of access recognized in article 15 of the GDPR can be limited by a rule with the rank of law, as recognized in article 23 of the GDPR, in particular article 23.1 .d) with regard to the cases in which access may harm the investigation of facts that may constitute a criminal offense or, in a similar sense, the provision of article 21.1.b) of the LTC, which expressly establishes the possibility of limiting or denying access to public information if its knowledge or disclosure entails a detriment to the investigation or sanction of the criminal, administrative or disciplinary offense in question.

In short, while the prior information is being processed, its reserved character must prevail and access to its content must be denied until this phase is concluded (STSJM 471/2006, of May 24).

In the case being analyzed, it does not seem that the preliminary information phase has concluded. Consequently, having transferred everything that has been set out in the request for access to the investigation file claimed by the claimant, the claim must fall in favor of the reserved nature of the previous information. Therefore, access must be denied.

v

It is appropriate to make an indent in relation to the objections formulated by the claimant.

From the perspective of transparency regulations, in particular from article 25 of the LTC and article 68.2 of Decree 8/2021, of February 9, on transparency and the right of access to public information, when any of the limits provided for in these rules apply, partial access must be given to information that is not affected by the restriction as long as it does not reveal information that has been legally hidden. For this reason, it is necessary to see if access to the information contained in the recusal incidents would also be affected by the limitation derived from the right to the protection of personal data and the reserved nature of the information.

The promotion of recusal is an incidental issue regulated in article 24 of Law 40/2015, of October 1, on the legal regime of the public sector (LRJSP), which reserves to those interested in an administrative procedure the possibility to promote the recusal at any time of the processing of the procedure with respect to the authorities and the personnel at the service of the administrations, who are aware of the matter, and in whom some of the circumstances that are contained in article 23.2 of the 'LRJSP.

Based on this basis, regardless of what has been revealed in relation to the files of reserved information in the previous legal basis, to which the claimant would not have the right of access in accordance with the regime that provides the regulations of the administrative procedure, the conclusion may be different with regard to the recusal file.

Although in principle, the person claiming does not have the right to present a recusal, given that, as we have said, the possibility of raising an incident of recusal is a possibility reserved for the persons interested in a procedure, in the event that we it seems that the claimant has raised it anyway.

Article 4.1.a) of the LPAC considers anyone who promotes it as the owner of individual or collective legitimate rights or interests to be interested in an administrative procedure. And this can lead to having to recognize the status of interested party to whom a recusal is raised (even if it is inappropriate).

In accordance with the first Additional Provision of the LTC, the access of interested persons during the processing of a procedure is governed by the administrative procedure regulations.

Article 53.1.a) of the LPAC recognizes the right of interested parties "to know, at any time, the status of the processing of the procedures in which they have the condition of interested parties; the sense of administrative silence that corresponds, in the event that the Administration does not dictate or notify an express resolution in time; the competent body for its instruction, in its case, and resolution; and the proceedings dictated. Likewise, they will also have the right to access and obtain a copy of the documents contained in the aforementioned procedures.

Taken to the case at hand, to the extent that the claimant has promoted the recusal of certain members of the investigation commission, in accordance with article 4.1.a) of the LPAC, he is considered interested in the processing of this incidental issue, and the rights provided for in article 53.1.a) of the LPAC in relation to this specific incident must be recognized. And this it includes not only the right to obtain a resolution of the incident raised, but also to access the record regarding that incident.

In short, to the extent that the claimant holds the status of an interested party with regard to the objections promoted, according to what the LPAC provides (in relation to DA1a. section 1 of the LTC), the regulations would allow him to access to the documentation containing the incidental questions relating to the promotion of the objections that he formulated.

conclusion

Based on the information that is available, the regulations do not allow the claimant (and whistleblower) to access the reserved information file relating to the investigation of facts allegedly constituting workplace harassment. However, he can access the documentation relating to the recusal incidents he has promoted.

Barcelona, October 29, 2021