

IAI 76/2021

Report issued at the request of the Commission for the Guarantee of the Right of Access to Public Information in relation to the claim against a city council for the denial of access to four disciplinary files, by several municipal councillors.

The Commission for the Guarantee of the Right to Access to Public Information (GAIP) asks the Catalan Data Protection Authority (APDCAT) to issue a report on the complaint filed against a City Council for the denial of access to four files sanctions by several municipal councilors.

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 Counsel, I inform you of the following:

#### Background

1. On July 14, 2021, several councilors request the City Council to access electronically four disciplinary files identified by their file number.
2. On October 21, 2021, one of the applicant councilors presents a claim to the GAIP against the City Council in which he states that "As an elected official, one of my tasks entrusted by the citizens is to supervise and control . Access to the files would help me to understand some facts, although I am not at all interested in the details of the people who may appear in them. I have been denied access because they tell me that I do not have the right to access it. (I am attaching a document - ACCESS REQUEST FOR SANCTIONING FILES with the request I am making to the GAIP) I am asking for clarification if, as an elected official, I have the right to access and under what conditions."

The claimant attaches to the claim the letter by which the mayor's office informs him that, considering that it was a matter of disciplinary proceedings against individuals, a hearing procedure was granted to the interested parties with the result that some of the letters were returned and others no response had been obtained. For this reason, the mayor's office considers that the consent of the interested parties is not available and denies him access.

3. On October 27, 2021, the GAIP requests the City Council to issue a report on the claim submitted, identify the third parties affected by the access and send the completed file to which it refers. This report is not among the documentation sent by the GAIP.
4. On November 3, 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 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

Article 4.2) of the RGPD considers "treatment": any operation or set of operations carried out on personal data or sets of personal data, either by automated procedures or not, such as collection, registration, organization, structuring, conservation, adaptation or modification, extraction, consultation, use, communication by transmission,

dissemination or any other form of enabling access, comparison or interconnection, limitation, suppression or destruction.”

The RGPD provides that all processing of personal data must be lawful (Article 5.1.a)) and, in this sense, establishes a system of legitimizing data processing based on the need for one of the legal bases to be met established in its article 6.1. Specifically, section c) provides 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".

Article 6.3 of the RGPD establishes that the basis of the treatment indicated in this article 6.1.c) must be established by the Law of the European Union or by the law of the Member States that applies to the person responsible for the treatment.

The reference to the legitimate basis established in accordance with the internal law of the Member States referred to in this article requires that the rule of development, when dealing with the protection of personal data of a fundamental right, has the status of law (Article 53 EC ), as recognized in Article 8 of Organic Law 3/2018, of December 5, on the protection of personal data and the guarantee of digital rights (hereinafter, LOPDGDD).

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 Member States that applies to them in order to reconcile public access to official documents with the right to the protection of personal data under this Regulation.”

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

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

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

In this case, the person requesting access has the status of councilor of the corporation, and therefore, the assessment that can be made regarding the obligation to provide or not provide personal information of third parties must be examined taking into account the right of access that the local regime regulations attribute to councilors - that is, Law 7/1985, of April 2, regulating the bases of the Revised text of the Municipal and Local Regime Law of Catalonia, approved by Legislative Decree 2/2003,

of April 28 (TRLMRLC) - regarding that information available to the City Council that is necessary for the fulfillment of its functions.

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

### III

As this Authority has decided on previous occasions (among others, the reports IAI 48/2019, IAI 52/2019, IAI 3/2020, IAI 41/2020, IAI 27/202, IAI 36/ 2021 or IAI 43/ 2021 which can be consulted on the [website http://apdcat.gencat.cat](http://apdcat.gencat.cat)), local regime legislation recognizes a right of access to all elected positions, regardless of whether they are in the government team or in the opposition, to the information that their local corporation has and that may be necessary for the exercise of the functions that correspond to them.

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

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

The right to obtain all the antecedents, data or information that are in the possession of the services of the local corporation and necessary for the exercise of their functions, in accordance with repeated jurisprudence on this issue (STS September 27, 2002 , June 15, 2009, among others), is part of the fundamental right to political participation enshrined in article 23.1 of the Spanish Constitution, according to which "citizens have the right to participate in public affairs, directly or through representatives, freely elected in periodic elections by universal suffrage."

It should be borne in mind that the elected officials participate in a public action that manifests itself in a wide range of specific matters, such as the right to audit the actions of the corporation, the control, analysis, study and information of the necessary antecedents that have the services of the City Council, for their control task and to document themselves for the purposes of adopting decisions in the future (among others, STS of March 29, 2006). In relation to this, the STS of June 27, 1998 already stated that "[...] To be able to carry out this supervisory and controlling function, it is necessary to know beforehand the data and background that are needed for this purpose, which implies the need to have access to all the data, antecedents and information [...] to then select those that can be useful in the fulfillment of the function entrusted to the councilors [...]"

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

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

#### IV

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

"2. The corporation's services must provide information directly to the members of the corporations when: a) They exercise delegated functions and the information refers to matters of their own responsibility. b) These are matters included in the agenda of the sessions of the collegiate bodies of which they are members. c) It is about access to information or documentation of the local corporation that is freely accessible to citizens."

Article 42 of the ROF establishes that "The Mayor will give a brief account to the Corporation, in each ordinary session of the Plenary, of the resolutions that he had adopted since the last ordinary plenary session so that the Councilors know the development of the municipal administration in the effects of control and supervision of government bodies, provided for in article 22,2, a), of Law 7/1985, of April 2".

With respect to this obligation of the mayor to give an account in plenary of the resolutions adopted since the last plenary session, the Supreme Court (Judgment 682/2020 of June 5, 2020, Rec. 2988/2017) has established doctrine in the meaning of including in this obligation all the resolutions issued by the mayor, including those issued by the Local Government Board by its delegation, as well as the obligation to "dedicate part of the session to the control of the organs of government of the corporation, ex article 46.2.e) of the LBRL, by means of a specific section, which has its own substance, distinct and apart from the section relating to "requests and questions".

Therefore, it cannot be ruled out that the councilors can access the resolutions of the sanctioning files that the mayor's office has dictated in respect of which they must give an account to the plenary by application of article 42 of the ROF. This access would allow them to know, in their case, the penalty imposed, the offense committed and the person responsible for the offence.

Now, the direct access that derives from article 164.2 TRLMRLC does not mean that, in general, there is a right to indiscriminate access to the information referred to in these articles, but that before making available to councilors this information the city council must take the appropriate measures, which may vary in each case, in order to facilitate access to the

information without violating the right to data protection, especially with regard to special categories of data or others that require special protection. Thus, given the special nature of the information linked to the sanctioning files, this provision of the ROF would justify giving access to information on the infringing subject, the offense committed and the sanction imposed (given that without this minimum information it does not seem that it can be understood satisfied the mandate to give an account to the plenary of a mayor's decree in disciplinary matters, but instead it would not seem justified to provide other information that may be included in the disciplinary file.

In the case at hand, the councilor's request aims to access four specific sanctioning files that the councilor identifies with their corresponding numbers. From the information available, the request does not state that it is information necessary to prepare the session regarding topics included in the agenda of the corresponding session or those that the mayor's office has to give an account, nor that the request is framed in one of the cases of direct access referred to in article 164.2 TRLMRLC,. Consequently, it will be necessary to take into consideration what is established in article 164.3 TRLMRLC, as well as the procedure applicable to these requests for access provided for in article 14 of the ROF.

Article 164.3 TRLMRLC, establishes.

"3. In the other cases, the request for information is understood as accepted by administrative silence if a negative resolution is not issued within four days from the date of presentation of the request. In any case, the negative resolution must be motivated, and can only be based on the following assumptions:

- a) When the knowledge or dissemination of the information may violate the constitutional right to honor, personal or family privacy or one's own image.
- b) When it comes to matters affected by the general legislation on official secrets or for summary secrecy."

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

This principle implies, on the one hand, that access to municipal information that includes certain personal data, without the consent of those affected, must necessarily be linked to the exercise of the functions that correspond in each case to the councilor who is deal, in the terms provided for in the local regime legislation (whether they are part of the governing bodies or not). Thus, the processing of personal data that may be carried out by councilors who do not have assigned government responsibilities, as it seems would happen in the present case, would find its justification, from the perspective of data protection, in the exercise of the functions they have attributed as members of collegiate bodies of the local entity itself and, in a special way, in

the functions of control and supervision of municipal action, such as the formulation of questions, interpellations, motions or even the motion of censure, which are attributed to them by the local regulations.

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

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

In the case we are dealing with, it is not known to which material area the claimed sanctioning files correspond, and if the sanctioned subjects are natural or legal persons. However, among the documentation that the claimant attached to the claim is the official notice by which the decision of the mayor's office to deny access to the files is communicated and where it is indicated that these are files sanctioning individuals". So they seem to refer to natural persons.

In any case, given that the specific files requested are not available, it should be remembered that the data of legal entities are excluded from the scope of protection of the data protection regulations as specified by the RGPD itself in its recital 14.

Consequently, there would be no inconvenience, from the point of view of data protection regulations, in providing the councilor claiming the sanctioning files in the event that they had legal persons as responsible for the administrative offence.

However, in the case of sanctioning proceedings against natural persons, in the weighting of the interests at stake it must be taken into account that from the point of view of the personal data protection regulations, the information relating to administrative or criminal offenses and sanctions is subjected to a reinforced protection system.

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 will regulate, as the case may be, 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.”

Also, we see this protection also contained 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."

As this Authority has pointed out, and in accordance with local regime legislation and the jurisprudence of the Supreme Court, councilors cannot be required to, in order to access municipal information, explain or justify the purpose of their request, since the reason for their request must be understood as implicit in the exercise of their functions as councilors, who are responsible for the control and supervision of the governing bodies of the corporation, as explained in article 22.2.a) of the LRBRL.

Now, interpreting the provisions of local regime legislation and the jurisprudence of the Supreme Court, in connection with the RGPD and with the need to circumscribe access to personal data within the framework of a legitimate purpose, it is appropriate to take into consideration the statements made by the councilor specifying the purpose for which they are requesting

In the case we are dealing with, the councilor states in his claim that "one of the tasks entrusted by the citizens is to inspect and control. Access to the files would help me understand some facts."

From the information available, it seems that these are recent disciplinary proceedings, processed in a period during which the applicant councilor already held this status. Taking into account what we have explained above, it seems that this may be a matter in which the councilor could have had access by way of the mayor's reporting to the municipal council. This would be an essential element when assessing the possibility of accessing certain information about the identity of the sanctioned persons, the offense committed and the sanction imposed. And this, whether they have been imposed by the mayor's office or by another body of the municipal administration to which the mayor's office has delegated or devolved this possibility. On the other hand, this is not a massive request for information on sanctioning files (case in which access to aggregated data could be justified), but is limited to specific files.

However, it does not seem that these generic tasks of control and supervision of municipal activity is a sufficient reason to justify full access to files that may contain particularly sensitive personal information, which may seriously affect the privacy of the people affected.



It is clear that the disclosure of this information may lead to a significant interference in the right to the protection of personal data of the persons affected, to the extent that the fact of disclosing that it has been the subject of a sanctioning file and knowing the specific facts that are imputed to him and the rest of the circumstances that may appear in the sanctioning file can significantly affect the personal, intimate or social spheres of these people.

In the absence of more information on the need to have this type of information, for the exercise of his functions of supervision and control of municipal action, it does not seem that full access of the councilor to the files alone can be admitted bids

In short, it would be necessary to deny the councilor access to the sanctioning files claimed since the information contained in them deserves special protection in accordance with the analyzed data protection regulations and there are no other circumstances that allow the prevailing councilors' right of access over the right to data protection of interested persons.

In fact, the councilor himself states that he has no interest in knowing the personal data that may appear in the sanctioning files claimed. In other words, it might seem that facilitating access to files in an anonymized way would allow to avoid the limitations derived from the right to the protection of personal data.

However, it does not seem that in this case anonymization can be an effective guarantee.

As stated in Recital 26 of the RGPD "data protection principles must not be applied to anonymous information, that is to say information that is not related to an identified or identifiable natural person, nor to data converted into anonymous information in such a way that the interested party is not identifiable, or ceases to be so. Consequently, this Regulation does not affect the treatment of said anonymous information, including for statistical or research purposes".

In the case at hand, it cannot be guaranteed that the anonymization will be effective since there are many possibilities that the person or persons who have been the subject of these sanctioning files will continue to be identifiable despite deleting their identifying data from the file. First of all, because the councilor makes his request regarding specific and identified files and this circumstance suggests that he already knows the identity of the people sanctioned or at least the context in which they occurred. But in addition, to the extent that it is a matter of files for which the mayor's office had to give an account to the plenary during a period in which the person making the claim had the status of councilor, he would already have had access to the information that is stated in the corresponding mayor's decrees. Therefore, he would already have knowledge of the identity of the person who has been the subject of the sanctioning file, as well as of the imputed infraction and the sanction imposed.

For this reason, the data protection regulations would not prevent the councilor from having access to certain information related to the sanctioning files claimed, such as the imputed infractions, for the exercise of his functions of control and supervision of the municipal action, the sanctions finally imposed and, in cases like the one described (where the councilor has the right to access the corresponding mayoral decrees) to also know the identity of the person who has been the subject of the sanctioning file.

## **Conclusions**

**In accordance with the data protection regulations, it would be necessary to limit the councilor's access to the requested sanctioning files, however, to the extent that the resolutions of the requested files correspond to acts for which the mayor's office must report to the plenary and have dictated within a period in which the applicant has the status of councilor, could have access, for the exercise of his functions of control and supervision of the municipal action, to the information relating to the penalty imposed, the offense committed and the pe**

**Barcelona, November 17, 2021**

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