

IAI 78/2021

Report issued at the request of the Commission for the Guarantee of the Right of Access to Information Public in relation to the claim presented against a city council for denying access to the tests of two participants in a selective process

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 brought against a city council for the denial of access to the tests carried out by two participants in a selective process to provide, through the competitive competition system, a position of superior technician in law for another person also participating.

Having analyzed the request, which is accompanied by a copy of the administrative file processed before the GAIP, and in accordance with the report of the Legal Counsel, I issue the following report:

Background

1. On July 8, 2021, a person who participates in a certain selective process to provide through the competitive competition system a senior technical position in law at a City Council addresses a letter to this City Council in which he expresses his disagreement with the assessment of their merits and, at the same time, requests a copy of the tests taken by two applicants "understanding by tests the 2 exercises of the theoretical part and the practical test", as well as a copy of the tests that she herself has taken.
2. On September 20, 2021, this same person, faced with the lack of response to his request, filed a claim with the GAIP against the City Council for denying access to the requested public information.
3. On September 22, 2021, the City Council resolves the request for access to the aforementioned public information in the following terms:

"In response to the letter dated July 08, 2021 (registry 2021/11556), where you request a copy of your exam relating to the call for the selection of career civil servants to fill a senior technician position of law and the constitution of a stock exchange; we send you a copy of the correction model for the 1st theory test and a copy of your practical test and the 1st and 2nd theory test.

With respect to your request that we provide you with a copy of the tests carried out by the applicants (...) and (...), it is rejected since this access would cause significant damage to the mentioned people, because the disclosure of their exams is very intrusive for their privacy, as it disseminates data relating to their knowledge and abilities, without this making any significant contribution to the control of the selection process, nor to the defense of their interests."

4. On September 28, 2021, the GAIP sent the claim to the City Council, requesting the issuance of a report on which to base their positions, as well as the complete file relating to the request for access to public information and the identification of the third parties affected by the requested access.
5. On October 29, 2021, the GAIP addresses a new letter to the City Council in which it reiterates the request made on September 28, 2021, without, at the date of issue of this report, stating that the The City Council has sent the required information.
6. On November 10, 2021, the GAIP requests this Authority to issue the report provided for in article 42.8 of Law 19/2014, of December 29, on transparency, access to public information and good government, in relation to the claim presented.

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 the LTC, which regulates the complaint against resolutions regarding access to public information, establishes that if the refusal is based on the protection of personal data, the Commission must request 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 security of this person (article 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 repeals Directive 95/46/EC (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

Initially, the complaint is lodged against the denial of access and obtaining a copy of the tests taken by two applicants in a selective process to provide, through the competitive competition system, a position of superior technician in law at a City Council, as well as in the tests carried out by the claimant himself, who is also a participant.

However, after the presentation of the claim, as has been made clear in the background of this report, the City Council would have partially appreciated the request for information from the person now making the claim and, as such effect, I would have given him a copy of the correction model of the first theory test, as well as a copy of his exercises. Therefore, it is necessary to understand your request satisfied in this end.

In view of this, the purpose of this claim would be to access and obtain a copy of the tests taken by the two candidates referred to by the person making the claim in their request for access.

In accordance with section 7.2 of the bases of the call for the selection process, the opposition phase consists of a knowledge test, which includes the completion of two theoretical exercises, a practical test and, if the court considers it convenient, of an interview.

Both in the request for access and in the letter of complaint, the applicant limits the object of his request to the two exercises of the theoretical part and the practical test. Therefore, the information linked to the interviews, if they have been carried out, should be excluded from the requested access. This, without prejudice to the fact that the applicant can, with respect to his own interview and if he so requests, obtain the information linked to this test on the basis of article 15 of the RGPD, which regulates the right of the affected person's access to their own personal data.

In view of these considerations, the claimant's access and obtaining a copy of the two theoretical exercises and the practical case carried out by the two participants in the selection process who are affected by the selection process are examined below access

III

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

transmission, diffusion or any other form of enabling access, comparison or interconnection, limitation, 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".

As can be seen from article 6.3 of the RGPD 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 it can only be considered based on this legal basis of article 6.1.c) of the RGPD when this is 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 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."

Law 19/2014, of December 29, on transparency, access to public information and good governance (hereafter, LTC), aims to regulate and guarantee the transparency of public activity.

The first additional provision of the LTC states that "the access of the interested parties to the documents of the administrative procedures in progress is governed by what is determined by the legislation on legal regime and administrative procedure".

In accordance with this provision, when the access request is made by a person interested in an administrative procedure that is pending, the administrative procedure regulations will apply.

In this regard, article 53.1.a) of Law 39/2015, of October 1, on the common administrative procedure of public administrations (LPAC), recognizes the persons interested in an administrative procedure the right to access and obtain a copy of the documents contained in the procedures in which they have this condition.

And, in the same sense, article 26 of Law 26/2010, of August 3, on the legal regime and procedure of the public administrations of Catalonia, recognizes that citizens who have the status of persons interested in a administrative procedure in progress have the right to access the file and obtain a copy of the documents that are part of it.

According to the information available, the person requesting access to the exercises carried out by two people participating in the selective process indicated above is another person participating in the same process, who, according to the provisions of article 4 of the LPAC, has the status of an interested person, insofar as it may be affected by the result of this administrative procedure.

Likewise, according to the information available, the aforementioned selective process for which access is requested has not ended at the time when the access request was submitted. As previously highlighted by this Authority in report [IAI 51/2017](#), it must be understood that the right of access provided for in the administrative procedure regulations must also be exercised once the respective procedure (initial or administrative appeal) while the deadline for the filing of the administrative appeal or administrative dispute is open.

So, it can be concluded that the access request subject to report, to the extent that the person who makes it holds the status of a person interested in the procedure and that it is a procedure that has not been completed at the time of the request, must be governed by the right of access that regulates the administrative procedure regulations .

This right of access is directly linked to the right of defense of the person concerned and, as we have seen, is formulated in quite broad terms. However, this does not mean that it is an absolute right but that, when it conflicts with other rights, such as the fundamental right to the protection of personal data (Article 18 CE), it will be necessary to weigh the different rights at stake, in order to decide which should prevail and to what extent.

In fact, the LPAC itself establishes that it is necessary to apply the limitations provided for in the transparency legislation when it regulates the obtaining of copies or access to the file of the persons interested in the hearing procedure provided for in article 82.1, or when it regulates the right of interested persons to request the issuance of authentic copies of public administrative documents issued by the public administrations provided for in article 27.4.

These provisions must also be understood as applying with respect to the right of access provided for in article 53.1.a) of the LPAC and, consequently, what is established in articles 23 and 24 of the LTC.

IV

Article 23 of the LTC provides 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, the 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."

In similar terms, article 15.1 of Law 19/2013, of December 9, on transparency, access to public information and good governance (LT), in its wording given by the eleventh final provision of the LOPDGDD, has the following:

"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 may be authorized if the express consent of the affected person is counted or if the latter is covered by a rule with the force of law."

In the present case and in accordance with the bases of the call for the selection process, to which mention has been made above, the first test of knowledge consists "in a questionnaire of test-type questions related to the content of the syllabus" of the called position; the second knowledge test consists of "answering a questionnaire of questions or topics related to the program"; and the practical test consists "in the resolution of one or several practical cases raised by the court in accordance with the content of the program".

Taking this into account, it does not appear that the evidence of the two participating persons referred to in the claimant's request for access should contain information of special categories or specially protected by Article 23 of the LTC . In any case, if there was any data from a special or specially protected category, it would have to be excluded from access.

v

The claimant's access to the aforementioned evidence, therefore, requires a reasoned weighting between the public interest in the disclosure of the information and the rights of the affected persons, as provided in article 24.2 of LTC:

"2. If it is other information that contains personal data not included in article 23, access to the information can be given, with prior weighting of the public interest in disclosure and the rights of the affected persons. To carry out this weighting, the following circumstances must be taken into account, among others:

a) The elapsed time. b) The purpose of the access, especially if it has a historical, statistical or scientific purpose, and the guarantees offered. c) The fact that it is data relating to minors. d) The fact that it may affect the safety of people. (...)."

In accordance with article 18.2 of the LTC, the exercise of the right of access is not subject to motivation, but the fact that the applicant expresses the purpose he is pursuing and ultimately the reasons why interest in knowing the information adds a very important element to be taken into account as a weighting criterion between the public interest in the disclosure of the information and the rights of the people affected.

In the present case, the claimant has participated in the selective process of access to the position of senior technician in law and, according to the information available, he would have obtained the third best qualification, going on to occupy the second place on the exchange of work

The claimant motivates his request for access by being able to assess whether there were irregularities or arbitrariness in the selection process in which he participated, which would have directly harmed him and in the possibility of taking legal actions in relation to the selection process. Specifically, he states that "the reason I am asking for the copies of these two people in particular is to be able to compare them with mine and appreciate the different scores, both in the tests that can be evaluated with formulas, and those that can be evaluated through a judgment of value, in which these applicants have obtained the highest scores, with a big difference to the rest of the applicants".

In the letter that accompanies the claim, he adds that during the selection process "a somewhat strange situation occurred in my correction of my case study. Although I had the second best grade in the theoretical part, and the highest merit score, I was considered NOT SUITABLE for the practical case, which surprised me a lot, which prevented me from continuing in the procedure, not being able to access to the assessment of the merits, and the reason why I demanded a review. After the review, which they didn't even let me attend, my claim was accepted and I was given a 5, the minimum grade. Later, in the assessment of merits, I obtained the highest score, objectively, but the low grade of the practical case did not allow me to surpass the very high marks of the two candidates."

Given this, it seems clear that the person making the claim bases the access on a personal or particular interest, given his status as a participant in the selection process.

The private or particular dimension of the right of access to public information is specified by allowing people to access information that may be of interest to their sphere of particular interests and, in this sense, the purpose of access plays an essential role in balancing the two rights at stake. In fact, the particular interest that can be pursued by the citizen with the access is provided as a weighting criterion in article 15.3.b) of the LT, by expressly establishing that it is necessary to take into consideration "the justification by the applicants of their petition in the exercise of a right (...).

In turn, article 22.1 of the LTC provides that "the limits applied to the right of access to public information must be proportional to the object and purpose of protection. The application of these limits must take into account the circumstances of each specific case, especially the concurrence of a higher public or private interest that justifies access to the information."

In any case, for the purposes of making the correct weighting, it is particularly important that the information to which you want to access and obtain a copy is part of a competitive competition procedure and that the applicant has the status of a person interested in the same

Thus, it was picked up by the Supreme Court in the STS of January 26, 2011, where it was said that the right of access to the file "is certainly aimed at facilitating the right of defense (...) and this is what means offering the interested party the possibility of knowing in an administrative procedure all the facts and data that may be relevant to the protection of the rights and interests that he wants to exercise by any means".

In the balancing between the principle of publicity and transparency that must govern personnel selection processes and the right to the protection of the personal data of the persons affected, the principle of publicity and transparency must prevail. As an example, we can cite the Judgment of the National Court, of April 26, 2012, which, in accordance with this criterion, states that:

"(...)

In the present case, since it is a procedure of competitive competition we must attend to what is indicated in article 103 of the Constitution when it affirms that the Public Administration serves objectively the general interests and acts in accordance with the principles of efficiency, hierarchy, decentralization, deconcentration and coordination, with full submission to the law and the Law (paragraph 1) and when it states in paragraph 3 that "The law will regulate the status of public officials, access to public office in accordance with the principles of merit and capacity. (...)

From this point of view, we must conclude that the consent of those people who participate in a competitive competition procedure is not required for the treatment of the qualifications obtained in said procedure and **it as a guarantee and requirement of the other participants to ensure the cleanness and impartiality of the procedure in which they participate. (...)**"

In this same sense, Judgment 623/2018 of the Superior Court of Justice of Madrid, includes the following criteria:

"(...) it is affirmed that in the processes of competitive competition, the principle of publicity and transparency becomes essential, as a guarantor of the principle of equality. Thus, the National Court has weighed the principle of publicity with the protection of personal data, reaching the conclusion that during the processing of the selective process the former must prevail, because one of the exceptions to the requirement of consent for the treatment of data is that of the collision with general interests or with other rights of higher value that cause data protection to decline due to the preference that must be granted to that other interest. As it is a competitive competition procedure, the National Court considered that in accordance with Article 103 of the EC, the guarantees required by the processing of personal data cannot be used to obscure or nullify these general requirements that oblige the processes to be conducted in compliance minimum requirements for transparency and publicity. The superiority of these other values advises that in this case it is understood that the consent of those people who participate in a competitive competition procedure was not required for the treatment of the qualifications obtained in said procedure and it as a guarantee and requirement of the other participants to ensure the cleanliness and impartiality of the procedure in which they participate.

Therefore, the Defender concludes that the Administration must provide the applicant with access to that information relevant to the selection process that allows him to verify the cleanliness and impartiality of the procedure in which he participated, including the personal data of third parties also participating in the same processes selective with which the applicant competed for the same places."

In the evaluation of the tests carried out and the merits accredited by the candidates, which must be done in the selection process, there is undoubtedly a margin of technical discretion that corresponds to the qualifying body. The control of this margin of discretion, to avoid arbitrariness, can only be carried out if the subject harmed by the administrative decision (the

non-selected candidate) has the possibility of knowing the factual elements from which the evaluation carried out in this regard by the selection body is based.

Thus, in exercise of the right of defense and for the purposes of being able to verify any arbitrary actions of the qualifying body contrary to the principles of equality, merit, capacity and transparency that must govern in any procedure of this type, it would be justified that the applicant can have information on the different aspects that have been assessed in the selection process, that is the knowledge and abilities (through access to the exams carried out), the merits (both academic and experience) and the score obtained.

The issue, from the point of view of the principle of data minimization (Article 5.1.c) RGPD), according to which the data subject to treatment must be adequate, relevant and necessary for the fulfillment of the intended purpose with the access , focuses on determining whether this information should be exclusively from the applicant finally selected or it may also include other participants in the selection process.

The cited jurisprudence resolves the issue in the sense that it must be possible to access the aforementioned information relating to candidates who have obtained a better score than the applicant, but not to those who have obtained a worse score, nor to data unnecessary personal data for the defense of the person concerned, such as address, telephone number, email, etc.

Having the information referring to applicants who have obtained a worse score, or who have not passed the selection process, would not be justified, given that their position with respect to the person requesting access would not prejudice their rights and interests

In the present case, the claimant limits access to the tests carried out (two theoretical exercises and the practical case) by the two applicants who "obtained the highest scores" in the selection process, therefore, a better score than the 'obtained by herself, who, according to the information available, would have been in third position.

Consequently, it is necessary to recognize the right of the person claiming to access and obtain a copy of the tests of the two people to whom their request for access refers, who have obtained a better score than their own in the process selective in which they have participated.

conclusion

The right to data protection does not prevent the claimant from accessing and obtaining a copy of the tests (theoretical exercises and practical case) carried out by the two participants in the selection process who obtained the best score in their own, to be treated of relevant information for the control of the performance of the selection body and for the defense of its interests.

Barcelona, November 17, 2021

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