

CNS 3/2022

**Opinion in relation to the query formulated by the mayoress of a City Council on the request, made by a municipal worker, for access and copy of disciplinary files and with reserved information in which he has been an interested party as a reported**

A resolution of the Mayor is presented to the Catalan Data Protection Authority President of a town council for which, based on a request made by a municipal worker for access and copy of disciplinary files and with reserved information in which he has been an interested party as a denounced party, and in view of the provisions article 15 of Regulation (EU) 2016/679 of the European Parliament and of the Council, of 27/4, relating to the protection of natural persons with regard to the processing of personal data and the free circulation thereof (hereinafter, RGPD), dictates a decree with the following operative part:

"First.- Request a report from the Catalan Data Protection Authority in relation to the request made by the employee of the corporation(...), through which he requests a copy of the disciplinary files and with reserved information of which he has been an interested party as a defendant.

Second.- Suspend the deadline provided for in article 12.3 of the RGPD, until the corresponding report is issued.

Third.- Notify this resolution to the Catalan Data Protection Authority and the person making the claim, for their knowledge and effect."

Having analyzed the query that is not accompanied by other documentation, in accordance with the report of the Legal Counsel I issue the following opinion:

I

(...)

II

The city council, faced with a request made by a municipal employee in order to access "the disciplinary files and with reserved information in which he has been an interested party as a denounced", agrees to make a request for a report to this Authority.

Beyond referring to article 15 of Regulation (EU) 2016/679, of the Parliament and of the European Council, of April 27, 2016, General Data Protection (hereafter, RGPD) and the deadline to resolve and notify the request for access, the city council does not state what are the specific doubts raised by the aforementioned request for access.

Likewise, there is no specific request made to the City Council by the municipal worker that would allow it to be determined whether his request is part of the exercise of the right of access provided for in the aforementioned article 15 of the RGPD or it is a request for access to public information in accordance with Law 19/2014, of December 29, on transparency, access to public information and good governance (hereinafter LTC) or, even, if it is an access to pending files. However, with respect to this last issue, given that the request is called files "in which it has been", it is interpreted that these are finalized files, so that the present opinion is issued under this premise

The inaccuracy regarding the terms of the request is relevant because if it has not been indicated in the request that the right of access provided for in Article 15 of the RGPD is exercised and in the information requested, in more than the interested party's own data, information from third parties appears, transparency regulations should also be taken into account, specifically, the provisions of articles 23 and 24 of the LTC, as well as article 15 of Law 19 /2013, of December 9, on transparency, access to public information and good governance (LT).

It should be remembered that article 24.3 of LTC states that "Requests for access to public information that refer only to personal data of the applicant must be resolved in accordance with the regulation of the right of access which establishes the legislation on the protection of personal data." Conversely, requests for access to public information under the terms of the LTC, containing data from third parties must be resolved in accordance with the transparency regulations.

### III

In the case planned in the consultation, it is requested to access the disciplinary files and reserved information in which the person requesting has been an interested party as reported. Despite the fact that these files are not available, it can be foreseen that the disciplinary files and, in particular, the reserved information referred to in the request, contain personal information referring, in addition to the person reported, to the complainant or complainants, if applicable, of witnesses who have been able to intervene in the procedure, the personnel who have intervened in the file in the exercise of their duties, and even of third parties involved in the events.

For the processing of the request as an exercise of the right of access provided for in article 15 of the RGPD, it must be taken into consideration that this article establishes:

"1. The interested party will have the right to obtain from the controller confirmation of whether or not personal data concerning him or her are being processed and, in such case, the right to access personal data and the following information:

- a) the purposes of the treatment;
- b) the categories of personal data in question;

c) the recipients or the categories of recipients to whom the personal data was communicated or will be communicated, in particular recipients in third parties or international organizations; d) if possible, the expected period of personal data conservation or, if not possible, the criteria used to determine this period; e) the existence of the right to request from the person in charge the rectification or suppression of personal data or the limitation of the treatment of personal data relating to the interested party, or to oppose said treatment; f) the right to present a claim before a control authority; g) when the personal data has not been obtained from the interested party, any available information about its origin; h) the existence of automated decisions, including profiling, referred to in article 22, sections 1 and 4, and, at least in such cases, significant information about the logic applied, as well as the importance and expected consequences of said treatment for the interested party.

2. When personal data is transferred to a third country or an international organization, the interested party will have the right to be informed of the appropriate guarantees under article 46 relating to the transfer.

3. The person responsible for the treatment will provide a copy of the personal data subject to treatment. The person in charge may charge a reasonable fee based on administrative costs for any other copy requested by the interested party. When the interested party presents the request by electronic means, and unless he requests that it be provided in another way, the information will be provided in a commonly used electronic format.

4. The right to obtain a copy mentioned in section 3 will not negatively affect the rights and freedoms of others."

In this regard, Recital 63 of the RGPD specifies:

"Those interested must have the right to access the collected personal data that concern them and to exercise said right easily and at reasonable intervals, in order to know and verify the legality of the treatment. This includes the right of those interested to access health-related data, for example the data of their clinical histories that contain information such as diagnoses, test results, evaluations by doctors and any treatments or interventions performed. All interested parties must, therefore, have the right to know and be informed, in particular, of the purposes for which personal data is processed, its processing period, its recipients, the logic implicit in all automatic processing of personal data and, at least when it is based on profiling, the consequences of said treatment. If possible, the person responsible for the treatment must be empowered to facilitate remote access to a secure system that offers the interested party direct access to their personal data. This right must not adversely affect the rights and freedoms of third parties, including trade secrets or intellectual property and, in particular, intellectual property rights that protect computer programs. However, these considerations should not result in the refusal to provide all the information to the interested party. If you try a big one

quantity of information relating to the interested party, the person responsible for the treatment must be empowered to request that, before the information is provided, the interested party specifies the information or treatment activities to which the request refers."

Therefore, in accordance with the data protection regulations, any interested party can exercise the right referred to in article 15 of the RGPD so that the person in charge of the treatment informs them whether their data is being processed personal data and, if affirmative, of the data being processed, as well as the rest of the information specified in this article (the purposes, the categories of data, the recipients to whom they have been communicated or will be communicated, the expected term of data conservation, the rights relating to the protection of your data that you can exercise, when appropriate, the information on the origin of the data, on the existence of automated decisions and the guarantees in case of international transfers).

This is a very broad right to the extent that the concepts of personal data and treatment are also very broad, so that in general a right of access to all the data that the person in charge is dealing with is recognized an interested party regardless of the means, formats and supports in which they are processed, which includes the possibility of obtaining a copy of the personal data subject to treatment (article 15.3 RGPD), with the limitations that may derive from the existence of rights of third parties (art. 15.4 RGPD) and, eventually, from the exceptions that may derive from rules with legal status in accordance with article 23 RGPD.

It does not seem that the case at hand applies to any of the exceptions provided for in article 23 of the RGPD, which establishes:

"1. The Law of the Union or of the Member States that applies to the person responsible or the person in charge of the treatment may limit, through legislative measures, the scope of the obligations and the rights established in articles 12 to 22 and article 34, as well as in article 5 to the extent that its provisions correspond to the rights and obligations contemplated in articles 12 to 22, when such limitation essentially respects fundamental rights and freedoms and is a necessary and proportionate measure in a society democratic to safeguard:

- a) the security of the State;
- b) the defense;
- c) public security;
- d) the prevention, investigation, detection or prosecution of criminal offenses or the execution of criminal sanctions, including the protection against threats to public security and their prevention;
- e) other important objectives of general public interest of the Union or of a Member State, in particular an important economic or financial interest of the Union or of a Member State, including in the fiscal, budgetary and monetary areas, public health and social security;
- f) the protection of judicial independence and judicial procedures;
- g) the prevention, investigation, detection and prosecution of violations of deontological norms in the regulated professions;

h) a function of supervision, inspection or regulation linked, even occasionally, with the exercise of public authority in the cases contemplated in letters a) ae) and g);

i) the protection of the interested party or the rights and freedoms of others;

j) the execution of civil demands.

(...)"

However, among the information requested are records of reserved information. It should be borne in mind that the reserved information file is framed in the provision of article 55 of Law 39/2015, of October 1, on the common administrative procedure of public administrations (LPAC), by which:

"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) Order, in advance, the realization of reserved information. [...]"

These investigative actions are fundamentally 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 may be responsible and the relevant circumstances concurrent

It is a consolidated jurisprudential criterion that the investigation phase prior to the start of a procedure sanctioning or disciplinary does not properly constitute an administrative procedure (among others, STSJM 471/2006, of May 24), as well as its reserved nature (its knowledge can lead to clear damage to the result of the same) prevents access to its content during its processing (among others, STS 21/2018, of February 15). And this even affects the person being investigated (among others, STSJC 1212/2005, of November 25).

Along these lines, the LTC expressly establishes the possibility of limiting or denying access to the public information if its knowledge or disclosure leads to a detriment to the investigation or the penalty for the criminal, administrative or disciplinary offense in question (article 21.1.b)).

It should be borne in mind, in this sense, that the right of access recognized in article 15 of the RGPD is can be limited by a rule with the rank of law as recognized in article 23 RGPD, especially 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 deny access to public information if its knowledge or disclosure entails damage for the investigation or sanction of the criminal, administrative or disciplinary offense in question treat

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

On the contrary, once the reserved information file is concluded, its reserved or confidential nature may cease.

As explained in ground II of this opinion, it is based on the premise that the requested files have ended and, therefore, to the extent that the preliminary information phase has ended, their reserved nature would have lapsed.

With regard to the documentation corresponding to the actions of reserved information, it should also be taken into consideration that article 38 of Decree 243/1995, of June 27, which approves the Regulation on the disciplinary regime of the public function of the Administration of the Generalitat of Catalonia, also applicable to the staff of local bodies (article 237.1 of Decree 214/1990), provides that the investigating body can agree to incorporate it into the disciplinary procedure. In the case we are dealing with, the disciplinary files could therefore incorporate, if that were the case, the finalized reserved information files that were their source.

In any case, with respect to the information relating to the applicant contained in the requested files, in accordance with the provisions of article 15 of the RGPD and as this Authority has highlighted on previous occasions, the person requesting access has the right to know not only the direct information about him/her that the person in charge is dealing with but also, among other issues, the origin of this information when it has not been obtained from the same interested person, which could lead to identifying the third parties who have contributed their information to the file. This would include identification, but not other information provided by or relating to such persons that cannot be considered to refer to the person requesting access.

This means, in the case at hand, that in accordance with the personal data protection regulations (art. 15 RGPD) the applicant, as reported in the disciplinary and confidential information files, not only has right of access to the information about your person that appears in those files, and that has been provided or generated during the course of the procedure, but also to know the identity of the people (complainants or witnesses) who

have provided the information, to the extent that it would form part of their right to know the origin of the data.

All of this, unless there is some element that, depending on the personal situation of these people, must lead to a limitation of this access. As established in section 4 of article 15 RGPD, "The right to obtain a copy mentioned in section 3 will not negatively affect the rights and freedoms of others."

For this reason, it would be advisable that, prior to the resolution of the accused's request for access to the disciplinary files and reserved information, the City Council informs the complainants and witnesses of this circumstance so that they can assess their situation and, consequently, they can present allegations or exercise their right of opposition regarding the access of the reported person.

This communication before deciding on access would be based on article 21 of the RGPD ("The interested party will have the right to object at any time, for reasons related to their particular situation, to which personal data that concerns them is the object of a treatment based on what is provided in article 6, section 1, letters e) of), including the elaboration of profiles on the basis of said provisions. The person in charge of the treatment will stop processing the personal data, unless it proves compelling legitimate reasons for the treatment that prevail over the interests, rights and liberties of the interested party, or for the formulation, exercise or defense of claims.").

Beyond that, and with regard to the information of other third parties that may appear in the requested files and that cannot be considered as the origin of the applicant's personal information incorporated in the files, the data of these third parties contained in the requested documentation.

#### IV

Otherwise, if given the desire of the applicant to obtain a complete copy of the files claimed, beyond the right of access to the own data provided for in article 15 of the RGPD, it entails having to have access to other information that appears in the file and that cannot be considered included in the right of access provided for in the regulations for the protection of personal data, it will be necessary to take into account the regulations governing the right of access to public information.

In accordance with the provisions of article 5.1.a) of the RGPD, 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 to comply with 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 responsible for 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 Member States that applies to them in order to reconcile the public's access to official documents with the right to the protection of personal data under this Regulation"*.

The regulation and guarantee of public access to official 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 (henceforth, 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 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 we are concerned with, the requested documentation is public information from the point of view of article 2.b of the LTC and, as such, is subject to the right of access (article 18 of the LTC), being documentation held by the City Council as a result of the exercise of their powers.

However, in accordance with article 20 et seq. of the LTC, the right of access to public information may be denied or restricted for the reasons expressly established in the laws. Specifically, articles 23 and 24 of the LTC regulate the limits on access to public information when the information to which access is sought contains personal data.

v

According to article 23 of the LTC:

"Requests for access to public information must be denied if the information sought contains particularly protected personal data, such as those relating to ideology, trade union affiliation, religion, beliefs, racial origin, health and sexual life, and also those relating to the commission of criminal or administrative offenses that do not entail a public reprimand to the offender, unless the affected party expressly consents by means of a written which must accompany the application."

At the outset, part of the information requested is information related to the commission of administrative, in this case disciplinary, infractions. It must be taken into consideration that the disciplinary files processed by the public administrations are part of their sanctioning power, in this case with respect to their own workers, for the commission of disciplinary administrative infractions. As can be seen from article 94 of the Basic Statute of the Public Employee (EBEP), approved by Royal Legislative Decree 5/2015, of October 30, and as recognized by jurisprudence (among others STS of July 3, 2012, FJ 6) the procedures



disciplinary measures must conform, with some nuance, to the general principles of administrative sanctioning law.

In short, as this Authority has highlighted, among others in reports IAI 21/2021 or IAI 69/2021, which can be consulted on the Authority's website [www.apdcat.cat](http://www.apdcat.cat), requests for access to public information must be denied if the information sought contains data relating to the commission of administrative infractions, including disciplinary infractions, if the consent of the interested party is not obtained or interested

However, as explained below and without prejudice to the fact that the information requested may contain information from third parties who had been reported in the same file, or in the same file of reserved information, this limit would not affect the sole tenderer to the extent that it is information on violations or disciplinary sanctions relating to the same complainant.

Nor can it be ruled out that the requested documentation contains other information that can fit into any of the other categories of data referred to in article 23 (for example health data of the complainant or of third parties). If this were the case, access to this data would have to be denied from the outset, unless we have your express consent to access your personal information.

## VI

With regard to the information about the employees or public officials in charge of the processing and resolution of the files, which may be included in the requested documentation, article 24.1 of Law 19/2014 provides that "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".

Article 70.2 of Decree 8/2021, of February 9, on transparency and the right of access to public information, specifies that pursuant to the provisions of Article 24.1 of Law 19/2014, of 29 December, "merely identifying personal data are those consisting of the name and surname, the position or position held, body and scale, the functions performed and the telephone and postal and electronic addresses, of professional contact, referred to the staff at the service of public administrations, senior officials and managerial staff of the public sector of public administrations".

Therefore, facilitate the applicant's access to the merely identifying data (name and surname and position) of public employees who, in the exercise of their functions, have participated in the requested files, in the terms indicated, in principle it would not be contrary to the right to the protection of personal data.

Outside of these cases, with regard to access to the rest of the information that contains personal data not included in article 23 or 24.1 of the LTC, the provisions of article 24.2 of LTC.

## VII

Article 24.2 LTC states the following:

"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 the provisions of article 18.2 of the LTC, the exercise of the right of access to public information is not conditioned on the fact that a personal interest is involved, as well as not being subject to the motivation or invocation of any rule, however, knowing the motivation of the request can be a relevant element to take into account and in fact, the purpose of the access is one of the elements that the city council must take into consideration in the weighting that needs to be done between the right of the applicant to access the information and the right to data protection of the persons affected by that access.

As stated in ground III of this opinion, in accordance with article 15 of the RGPD the applicant, as reported in the disciplinary and confidential information files, has the right to access the information that appears on your person in those files and that has been provided or generated during the course of the procedure. But in addition, taking into consideration that the information may originate from the denunciation of the facts as well as from the statements of the complainants and witnesses, in their case, this right would also include knowing the identity of the people who provided the information, who it would form part of your right to know the origin of the data.

The existence of this right, recognized by data protection regulations, will necessarily favor the weighting referred to in article 24.2 of the LTC in favor of access to the data itself contained in the complaint.

All of this, unless there is some element that, depending on the personal situation of these people, must lead to a limitation of this access. In this sense, article 32 of LTC, establishes:

"1. If the request for public information may affect the rights or interests of third parties, in accordance with the provisions of this law, in the event that the potential affected are identified or are easily identifiable, they must be transferred from the request, and they have a period of ten days to present allegations if these may be decisive for the meaning of the resolution.

2. The claims procedure referred to in section 1 suspends the deadline for resolution.
3. The transfer of the request must indicate the reasons for the request, if they have been expressed, but it is not mandatory to reveal the identity of the applicant.
4. The applicant must be informed of the transfer of the application to third parties and of the suspension of the deadline for issuing a resolution until the allegations have been received or the deadline for presenting them."

For this reason, it would be necessary that, prior to the resolution of the complainant's request for access to the files, the City Council informs the complainants and witnesses of this circumstance so that they can assess their situation and, in consequence, they can present allegations or exercise their right of opposition (Article 21 RGPD) regarding the access of the reported person. Ultimately, it is necessary to give a hearing to the complainants and witnesses so that their allegations can be evaluated in order to find out if there are circumstances that justify the limitation of access.

In any case, it does not seem that in any case it can be justified to give access to contact data or some other data (for example, the ID number) or other data that may be in the file and that are not relevant from the point in view of the claimant's knowledge of the information that affects him.

## VIII

Finally, it cannot be ruled out that the requested documentation may contain information from third parties other than the complainants or witnesses, as could, for example, the case where one of the reporting persons had considered it relevant for the purposes of their statement to refer to third parties to have some relationship with the facts that are the subject of the disciplinary file.

If this were the case, with respect to this information it would also be necessary to weigh the rights and interests at stake provided for in article 24.2 of the LTC.

It must be taken into account, as already explained, that the premise is that the files requested are files finalized at the time the request is submitted.

This fact implies that, unless some other element is revealed that can justify access to this information, it is not possible to appreciate the concurrence of a superior interest in the right of defense of the person claiming (article 24 EC) that could justify access to the information of third parties, beyond the referred to in the previous legal basis.

In addition, for weighting purposes it is necessary to take into account the principle of minimization, according to which personal data must be "adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed" (art. 5.1. c) RGPD). This principle requires that any treatment is limited to the minimum data necessary to achieve the intended purpose.

In accordance with this principle and, to the extent that it is information not relevant from the point of view of the right of defence, the right to data protection of these third parties should prevail in this case and limit, therefore, the applicant's access to data,

statements, opinions or explanations made by witnesses, regarding third parties other than the applicant. For this reason, if this kind of information exists among the requested documentation, it should be deleted or provided in an anonymized manner.

## **Conclusions**

The person requesting has the right to access and obtain a copy of the completed disciplinary and reserved information files in which they have the condition of being denounced, including the identification of the person or persons reporting and witnesses and the information on their person to the files, unless as a result of the exercise of the right of opposition or the result of the hearing procedure, the circumstances alleged by these people are justified in preserving their confidentiality.

The applicant also has the right to access the merely identifying data (name and surname and position) of the public employees who, in the exercise of their functions, have processed the requested files.

In the event that the requested information contains information from third parties other than the complainant or of the declarants that is not relevant from the point of view of their right of defense, this information must be deleted or provided in an anonymized form.

Barcelona, February 14, 2022