

## **Opinion in relation to the query made by a health consortium on access to personnel selection records**

A letter from the Data Protection Officer of a healthcare consortium is presented to the Catalan Data Protection Authority, in which several issues related to access to personal information in personnel selection files are formulated.

Specifically, the following questions are raised:

"Who can have access to the selection files? Any candidates with a legitimate interest in the process (process candidates for example) and workers' representatives?

What documentation can they access? To the entire file of the candidates (qualifications, experience, allegations, etc.), to the minutes of the selection committee or to an anonymized summary of the data and results?

Would access to the file be unlimited in time?

In the event of a request for review, could only the files of candidates who are in first place and/or have options to win a place be reviewed?

Should candidates be informed that their data may be subject to review by other candidates and workers' representatives?"

Having analyzed the consultation and given the current applicable regulations, and in accordance with the report of the Legal Advice I issue the following opinion.

I

(...)

II

The consultation raises several questions related to access to the records of personnel selection processes, focusing especially on clarifying the terms under which applicants and workers' representatives can access them.

According to the government agreement authorizing the creation of the consulting entity and approving its Statutes, this "is considered a health consortium and is subject to the legal regime established in the unique additional provision of Law 15/1997, of April 25, on enabling new management formulas for the National Health System. (...) is a public legal entity, of an institutional and associative nature, endowed with full legal personality and independent of that of its members, with all the legal capacity of public and private law required by

to the realization of its purposes, and remains attached to the Administration of the Generalitat of Catalonia through the Catalan Health Service" (article 4.1).

The unique additional provision of Law 15/1997, of April 25, on enabling new management formulas for the National Health System, to which this article refers, regulates the legal regime applicable to health consortia in the following terms:

"1. The health consortia whose main object is the provision of services of the National Health System are attached to the Health Administration responsible for the management of these services in their territorial scope of action and their legal regime is established in this provision and, subsidiarily, in that not regulated in this Law, the regulations that generally regulate the rest of administrative consortia.

2. (...)

**3. The staff at the service of the health consortia may be civil, statutory or labor** from the participating Administrations or **labor if hired directly by the consortium.** The labor staff hired directly by the health consortia affiliated to the same Administration will be subject to the same regime. The legal regime of the consortium's personnel will be the one that corresponds to its nature and origin."

In view of this, it is understood that the access referred to in the query is considered in relation to the files resulting from the selection processes of the labor personnel hired by the consortium sanitary

Article 30 of its Statutes provides that "the staff of the consortium is hired and governed by the rules of labor law, as well as by the rest of the public employment regulations that apply to them" (section 2).

It also provides that "the selection of permanent staff must be carried out through a public call, in accordance with the principles of equality, publicity, merit and capacity. The hiring of temporary cover must respect the same principles" (paragraph 4).

Although the consultation does not specify what information or documentation is part of the personnel selection files, whether permanent or temporary, it is clear from the terms in which it is formulated that, at a minimum, the participation requests will be included, the supporting or accrediting documentation of the merits and capabilities claimed by each applicant (curriculum vitae, academic qualifications, professional experience, etc.) and the documentation drawn up by the selection committee during the selection process in question. With regard to the selection procedure used for the recruitment of this staff, there could also be information on the tests (of knowledge, psychotechnical test, etc.) and/or interviews that, where appropriate, may take place to term

In any case, it is clear that the said selection files will contain a large volume of personal information of various kinds relating to the applicants, in addition to the data of the members of the selection committee and other personnel responsible for the processing and resolution of the selection process.

Regulation (EU) 2016/679, of the Parliament and of the European Council, of April 27, 2016, General Data Protection (hereinafter, RGPD), defines data processing as "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" (article 4.2).

Article 5.1.a) of the RGPD establishes that all processing of personal data must be lawful, fair and transparent (principle of lawfulness, loyalty and transparency).

Article 6.1 of the RGPD regulates the legal basis on which the processing of personal data can be based, among which the legal basis of section 1.c), relating to "the treatment is necessary for the fulfillment of a legal obligation applicable to the person responsible for the treatment".

It must be taken into account that, as is apparent 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 the guarantee of digital rights (LOPDGDD), data processing can only be considered based on the legal basis of article 6.1.c) of the aforementioned RGPD when it is established by a rule with the rank of law.

### III

For the purpose of determining the legality of the treatment (access to files), it is necessary to take into account the provisions of Law 19/2014, of December 29, on transparency, access to public information and good governance (hereinafter, LTC ).

This Law, whose purpose is to regulate and guarantee the transparency of public activity, extends its subjective scope of application "to public bodies and entities, companies with a majority stake or linked, public sector foundations, entities of public law dependent or linked to the administrations referred to in letter a, public law entities that act with functional independence or with a special autonomy recognized by law that exercise external regulation or supervision functions over a certain sector or activity, the institutions of the Generalitat referred to in chapter V of title II of the Statute of Autonomy, professional associations and public law corporations in what affects the exercise of their public functions and consortia or other forms associations and their affiliates and commercial companies in which one of these administrations has a majority share" (article 3.1.b) LTC).

Article 18 of the LTC recognizes the right of people to "access public information, which does reference article 2.b, in an individual capacity or in the name and representation of any legally constituted legal person" (section 1).

Article 2.b) of the LTC defines "public information" as "the information prepared by the Administration and that which it has in its possession as a result of its activity or the exercise of its functions, including that supplied by the other subjects bound by agreement with what this law establishes".

For its part, article 53.1 of Decree 8/2021, of February 9, on transparency and the right of access to public information (RLTC), specifies that it is public information subject to the right of access "all the information, any data or documents that the public administrations have prepared, possess, or can legitimately demand from third parties as a result of their activity or the exercise of their functions."

The information or documentation that is part of the personnel selection files of the health consortium is public information for the purposes of article 2.b) of the LTC and, therefore, remains subject to the access regime provided for in this regulation .

In the consultation, reference is made to the possibility of applicants and also the representatives of the workers accessing the complete personnel selection files (who can have access to the selection files? Any candidate with a legitimate interest in the process (the candidates of the process for example) and the workers' representatives? What documentation can they have access to? The entire candidate file (qualifications, experience, allegations, etc.), the minutes of the selection committee or an anonymized summary of the data and results?). Therefore, it is convenient to examine it in a different way, although it can be advanced that, in none of the cases, access to its entire content could be carried out.

#### IV

With regard to access to personnel selection files by the people participating in them (candidates), it is necessary to determine, first of all, what is the legal regime applicable to the access request.

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".

The person who participates in a personnel selection process has the status of interested person, to the extent that he may be affected by the result of this administrative procedure (article 4 Law 39/2015, of October 1, on the administrative procedure common of public administrations (LPAC)). Therefore, in the event that the selection process had not ended at the time when the access request is submitted, it should be borne in mind that this should be governed by the right of access that regulates the administrative procedure regulations .

The inquiry mentions the "request for review" and whether, in this case, "only the files of the candidates who are in first place and/or who have options to win a place could be reviewed" .

With this question, it seems that reference is being made to access regarding selection processes that have ended but in relation to which the deadline for filing an administrative appeal or administrative dispute remains open. In this case, as this Authority has previously highlighted in the [IAI 51/2017 report](#), which can be consulted on the Authority's website, it must also be understood that it must be possible to exercise the right of access provided for in the administrative procedure regulations.

In this respect, article 53.1.a) of the 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.

As the Authority has highlighted (for example, in the [IAI report 16/2021](#) or in [CNS opinion 25/2019](#), among others), this right of access is directly linked to the right of defense of the person concerned and 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 of third parties (Article 18 EC), it will be necessary to weigh the different rights at stake, in order to decide which should prevail and in which measure

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, with respect to access to information contained in the selection file of personnel in question, the provisions of articles 23 and 24 of the LTC will apply.

Given this, a first conclusion, from the point of view of data protection, would be that there would be no inconvenience in providing the person requesting access and a copy of that documentation of the personnel selection file in which do not contain personal data (Article 4.1 RGPD). This would be the case, for example, of the scales and criteria for correcting or assessing merits and tests.

Likewise, there would also be no inconvenience in providing him with access and a copy of that file documentation that contains exclusively his personal data, on the basis of article 15 of the RGPD, which regulates the right of the affected person's access to their own personal data. This would be the case, for example, of the documentation relating to your curriculum vitae, the exams or tests that, if applicable, you have taken, the evaluation made by the selection committee in this regard, etc.

With respect to the rest of the documentation contained in the file of the selection process that contains information about other people than the applicant, it is necessary to take into account the provisions of articles 23 and 24 of the LTC, to which we refer next.

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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 may be authorized in the event that

with the express consent of the person affected or if he was covered by a rule with the rank of law."

In the files relating to selective processes, it cannot be ruled out that there are data deserving of special protection, either because they have been provided by one of the candidates (for example, disabilities, need to adapt certain tests, etc.) or either as a result of any of the tests carried out during the selection process (for example, psychotechnical tests involving the assessment of aspects of personality, including, where appropriate, personal interviews).

Therefore, if there was any data from a special or specially protected category in the personnel selection files, it would have to be excluded from access, unless the request had provided the express consent of the people affected or that any other of the enabling circumstances provided for in article 15.1 of the LT occurs. If none of these circumstances occur, the right to data protection of the other candidates would prevail over the right to access the applicant's information.

## VI

With regard to the merely identifying information of the people who have intervened in the processing of the selection process due to their position (such as the members of the selection committee), a priori, there would be no inconvenience in providing it to the interested person

The knowledge of these data would be protected both in the right to identify the authorities and the staff at the service of the public administrations responsible for processing the procedures (article 53.1.a) LPAC), and in article 24.1 of the LTC, according to which "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, the protection of personal data or other constitutionally protected rights must prevail."

In this sense, article 70.2 of the RLTC specifies what are merely identifying personal data "those consisting of the name and surname, the position or position held, body and scale, the functions performed and the telephone and addresses, postal and electronic, of professional contact, referring to staff in the service of public administrations, senior positions and managerial staff in the public sector of public administrations.(...)".

## VII

In relation to the rest of the personal data of the participants that may be included in the file that are not considered to be particularly protected data, it would be necessary to adhere to the provisions of article 24.2 of the LTC, according to which:

"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.  
(...).”

First of all, it must be said that there would be no problem in providing the interested person with information that has been the subject of publication during the selection process and that may be included in the file.

It should be remembered that, in accordance with article 30.4 of the consortium's Statutes, the selection of its permanent staff must be carried out through a public call, in accordance with the principles of equality, publicity, merit and capacity, which is mentioned in the public employment regulations, as well as that these principles must also govern the hiring of temporary labor personnel.

Also that, given that personnel selection processes involve competitive competition, there would be sufficient legal authorization to make public the identity of the people finally selected, based on article 45.1.b) of the LPAC.

In fact, the LTC itself establishes, in its article 9.1.e), the obligation to publish (on the transparency portal or electronic headquarters) the notices and the results of the labor personnel selection processes, both permanent and temporary.

Article 21.2 of the RLTC specifies, in this regard, that "the data to be published must refer, at least, to the announcement of the call, the bases, the official announcements and the first and last name and the four numbers of the national identity document or equivalent document of the persons admitted to each test or exercise of the process and of the person finally selected, in accordance with the criteria established in the field of data protection.”

Given this, it does not seem that facilitating access to the information that has been disseminated during the course of the selection process that may be included in the file should have special relevance in terms of the right to the protection of personal data of the affected persons, particularly when the person requesting access has participated in the selection process, so it would be likely that it was already known to them.

Regarding access to the rest of the information of the other participants (request for participation, documentation proving the merits and/or the content of the tests that may have been taken, if applicable, etc.), and for the purposes of said weighting, it would be necessary to take into account the reasons for which he is interested in knowing the information and whether it could be relevant, in some sense, for the control of the performance of the health consortium in this area or if there is a particular interest (article 22.2 LTC and article 15.3.b) LT).

Apart from that, the fact that the information to which you want to access and obtain a copy would be part of a competitive competition procedure and that the applicant would have the status of an interested person would be of particular importance in the same

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. On this criterion and as an example, the Judgment of the National Court of April 26, 2012 or Judgment 623/2018 of the Superior Court of Justice of Madrid can be cited.

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 candidate not

selected) has the possibility of knowing the factual elements from which the evaluation carried out 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 knowledge and abilities (through access to the exams carried out if applicable), 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 , would focus on determining whether this information must be exclusively for the applicant finally selected or whether it can also cover other participants in the selection process.

As this Authority has maintained and, as supported by the cited jurisprudence, 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 personal data unnecessary 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 Therefore, it should not be made easy.

The considerations made in this legal basis and in legal bases V and VI would also be applicable in the event that the personnel selection process had ended at the time of submitting the application by the participating person. In this case, the applicable legal regime would be directly that of the transparency legislation, that is, articles 23 and 24 of the LTC and article 15 of the LT examined in the previous sections.

## VIII

With regard to access to personnel selection files by the workers' representatives, please note that this is an issue that has been previously examined by this Authority in, among others, the [IAI 18/2021 reports](#), [IAI 20/2021](#) or [IAI 40/2021](#), available on the Authority's website.

In this case, it must be borne in mind that the workers' representatives have a specific right of access to information. Therefore, in accordance with the first additional provision, section 2, of the LTC this regime is the one that should be applied as a priority, without prejudice to the supplementary application of the access regime provided for in the transparency legislation.

Specifically, article 64 of the Workers' Statute, approved by Royal Legislative Decree 5/2015, of October 30 (ET), attributes to the works committee, and by extension also to the staff delegates (article 62.2 ET), the right to be informed "(...) about those issues that may affect workers, as well as about the situation of the company and the evolution of employment in it, in the terms provided for in this article." Adding that information is understood as "the transmission of data by the employer to the works council, so that it has



knowledge of a certain issue and can proceed to its examination" (article 64.1 ET). And section 7 also attributes to the representative bodies the function, among others, of "vigilance in the fulfillment of the rules in force in labor matters, of Social Security and employment, as well as the rest of the agreements, conditions and uses of company in force, formulating, as the case may be, the appropriate legal actions before the employer and the competent bodies or courts."

In view of this, the eventual access to the personal information of the workers by their representative bodies should, in any case, find their qualification in this function of monitoring the rules in force.

However, as this Authority has indicated in the aforementioned reports, among others, beyond this, there is no other specific provision that is directly related to the personnel selection processes for the provision of positions of work. Therefore, the provisions of the transparency legislation should be taken into account, that is, articles 23 and 24 of the LTC and article 15 of the LT, transcribed in the previous sections of this opinion.

Thus, in this case, there would be no problem in giving the workers' representatives access to and a copy of that documentation of the personnel selection file that does not contain personal data (the scales and the correction criteria or evaluation of the merits and, where appropriate, of the tests, for example).

Nor in providing him, in principle, the merely identifying information of the people who had intervened in the processing of the selection process by reason of their position, such as members of the selection committee (article 24.1 LTC).

With regard to the information of the candidates, in general, the information deserving of special protection that could be contained in the files should be excluded from access (article 23 LTC and article 15.1 LT). And, with regard to the rest of the information, a reasoned weighting should be carried out between the public interest in the disclosure of the information and the rights of the affected persons, under the terms of article 24.2 of the LTC .

In this sense, it should be noted that this Authority has been considering that the representatives of the workers should be able to access the information that has been disseminated during the course of the selection process, in accordance with the applicable regulations in force, as well as also to the information necessary for the exercise of the functions legally attributed to them (article 64 ET) or, at least, that necessary to achieve the transparency purposes provided for in the LTC.

Taking this into account, it has been concluded, in the cases examined, that it would not be justified to provide information (curriculum vitae, documentation certifying merit, content of tests and/or interviews, etc.) relating to candidates who have not been selected, so that they were identifiable. The option, therefore, to deliver it anonymously, provided it is guaranteed that they cannot be identified either directly or indirectly.

With regard to the candidate finally selected, it has been considered that they could be provided with the supporting documentation of the alleged merits and the score obtained, as well as the content of the tests, if applicable, carried out, in case of to be part of a trade union organization that is considered more representative. On this issue we refer to the considerations made in the [IAI 18/2021](#) reports and [IAI 20/2021](#).

It has also been considered that the representative of the workers who, in accordance with the collective agreement of application, has been designated as an observer to be part of the selective body of the personnel selection process could access the information relating to people

candidates through their presence in the tests and sessions of the qualifying body, as well as consulting the information provided by the candidates and which is the subject of assessment. It would not be justified in this case to obtain a copy. On this issue we refer to the considerations made in the [IAI 45/2021 report](#).

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## IX

The consultation also raises the question of whether "access to the file would be unlimited in time".

It should be noted that the LTC does not establish any term regarding the conservation of public information and documentation, for the purposes of guaranteeing the exercise of the right of access (article 18 LTC). Therefore, it is not mandatory to keep the information that is available to respond to eventual requests for access, beyond the retention periods provided for in the provisions that apply to the specific case.

From the point of view of data protection, the person in charge must apply the principle of limitation of the retention period, taking into account the purpose that a certain treatment of personal data may have, with the aim that the treatment is not extend in time beyond what is necessary to achieve the purpose (articles 4.7 and 5.2 RGPD). This, without prejudice to the conservation, if applicable, for the ulterior purposes that are compatible under the terms of the data protection regulations.

Therefore, once the intended purpose has been achieved, the personal data relating to the selection files must be deleted, bearing in mind that the deletion does not necessarily equate to the erasure or destruction of personal information, but must give place to its blocking, under the terms of article 32 of the LOPDGDD.

However, it will also be necessary to take into account the conservation obligations in accordance with what is established in the corresponding documentary evaluation table or tables (TAD) that may be drawn up under the terms of Law 10/2001, of July 13, of files and documents, and which would also incorporate the blocking of information once the active and semi-active phase of the life of the documentation has passed and until the deadline provided for in the corresponding TAD is reached.

However, as this Authority has highlighted in the IAI 6/2022 report, the blocking of personal information should not void the possibility of exercising other rights, such as the right of access to information public, under the terms of the transparency legislation.

The communication of blocked data in this case would have the purpose of complying with an obligation of the person in charge, based on the Constitution (art. 105.b) EC) and the LTC, therefore, as was highlighted in the opinion [CNS 76/2016](#), could be lawful on the legal basis of [article 6.1.c\) RGPD](#).

Upon completion of the applicable data blocking period, the effective elimination of personal information relating to personnel selection files must be carried out.

Therefore, the attention of the right of access in relation to personnel selection files can be carried out while the health consortium has this public information.

In any case, remember that, in accordance with article 24.2.a) of the LTC, the elapsed time can be an element to be taken into consideration when making the weighting provided for in this article.

## X

The consultation also considers whether "it is necessary to inform the candidates that their data may be subject to review by other candidates and workers' representatives".

In accordance with article 13.1.e) of the RGPD, the data controller, when collecting personal data directly from the affected person, must inform them about "the recipients or the categories of recipients of the data personal, if any".

In other words, it must inform the affected party of those communications about its data that it plans to carry out in attention to the purpose for which this data is collected, but it is not necessary to include information on all possible transfers of data to which he may end up being obliged to do, when these derive from a rule with the rank of law.

However, it may be good practice to inform the affected persons about any communications that may be foreseen as a result of the applicable active advertising regime or about the possibility of access that the rest of the people participating in the selection process may have, already either in the basis of the call or in the request for participation.

On the other hand, remember that article 31 of the LTC establishes that if the request for public information may affect the rights or interests of third parties, identified or easily identifiable, they must be given the transfer of the request, so that they can make the allegations they consider appropriate, in those cases in which they can be determined about the meaning of the resolution.

This procedure is essential so that the affected persons have the possibility to state if they consent to access to the information or if there is any element that, depending on the personal situation of the affected person, in their opinion should involve a limitation of access.

Therefore, remember that it is up to the consortium, as the person responsible for the treatment, to carry out this hearing procedure for those affected prior to the resolution of the request for access by the applicant.

In accordance with the considerations made so far in relation to the proposed query, they are made next,

### **Conclusions**

People who participate or have participated in a personnel selection process would have the right to access certain personal information contained in the file, in the terms indicated in sections IV to VII of this opinion.

The representatives of the workers of the health consortium would have the right to access certain personal information contained in the personnel selection files, in the terms indicated in section VIII of this opinion.



The right of access to personnel selection files may be exercised while the consortium healthcare has this public information.

It may be good practice to inform applicants of the potential recipients of their data following their participation in the selection process.

Barcelona, April 1, 2022

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