

**Opinion in relation to the query made by a town council on the publication, for transparency purposes, of a reasoned report from the Antifraud Office of Catalonia that affects it**

A letter from a city council is presented to the Catalan Data Protection Authority in which several issues related to the publication are formulated, for transparency purposes, of a reasoned report issued by the Antifraud Office of Catalonia (OAC) on the occasion of the investigative actions carried out in relation to alleged irregularities affecting the collection of compensation by elected officials.

Specifically, the following questions are raised:

"a) If the reasoned report of the OAC is considered an administrative resolution of public relevance due to the impact or interest of the public in general, in accordance with the transparency regulations.

b) If, on the other hand, it is a procedural act that motivates the initiation of an administrative procedure and it is necessary to wait for the final resolution of the same (the agreement of the Plenary once the opinion of the Legal Advisory Committee has been received) to make the publication. In other words, it is a file that is pending and has not been resolved or finalized.

c) In the event that the publication of the reasoned report of the OAC was mandatory in accordance with the transparency regulations, what should be the content of the publication (on the municipal website, for example) under of the data protection regulations. would have to anonymize the personal data contained therein?

d) What data should be deleted?"

The query is accompanied by a copy of the reasoned report of the OAC in question.

Having analyzed the query and the documentation that accompanies it, in view of the applicable regulations in force, and in accordance with the report of the Legal Adviser, I issue the following opinion.

I

(...)

II

The consultation focuses on the possible publication, for purposes of transparency, of the reasoned report issued by the OAC on the occasion of the investigative actions carried out in relation to alleged irregularities that affected the collection of indemnities for part of the elected positions of the City Council.

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 the collection, registration, organization, structuring, conservation, adaptation or modification, extraction, consultation, use, communication by transmission, dissemination or any other form of enabling access, comparison or interconnection, limitation, suppression or destruction" (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

In the case at hand, and in accordance with the terms of the consultation, reference must be made to Law 19/2014, of December 29, on transparency, access to public information and good governance (LTC), which aims to regulate and guarantee the transparency of public activity, as well as people's right of access to public information and documentation.

Title II of the LTC regulates the regime of transparency in public activity, through which it obliges all the subjects included in article 3 of the LTC (among which, the bodies that make up the local administration in Catalonia ) to adopt the necessary measures to facilitate people's knowledge of public information, which must be made public in the electronic offices and websites of the obliged subjects.

The LTC defines "transparency" as "the proactive action of the Administration to make known the information relating to its areas of action and its obligations, on a permanent and updated basis, in a way that is more comprehensible to people and through dissemination instruments that allow them broad and easy access to data and facilitate their participation in public affairs" (Article 2.a)).

As the Preamble of the LTC highlights, the objective pursued with active advertising with the direct publication of certain information by the Administration without the need for citizens to request it, is to allow the participation of citizens in public affairs, evaluating public actions and guaranteeing a responsible exercise of public power.

The transparency obligations are those expressly defined by the aforementioned Title II of the LTC, in addition to those established by other specific laws, as provided for in article 6.2 of the LTC.

The LTC determines in a very broad way the various contents of the transparency obligations: institutional and organizational information, economic and budgetary management,

information of legal relevance, programming and planning, public procurement, subsidy activity, etc. (articles 8 to 15).

These subjects potentially subject to active publicity, it must be said, are susceptible to being affected by legal limits, as can be seen from article 7.1 of the LTC, according to which "the limits applicable to transparency obligations are the same as Title III establishes the right of access to public information, especially those relating to data protection." Thus, the obligation of active advertising can be restricted when this is required by any of the limits established by articles 21, 23 and 24 of the LTC or specifically by other laws.

For the relevant purposes, it should be borne in mind that the LTC does not expressly provide, among the obligations of active publicity (articles 8 to 15), for the publication of the reasoned reports referred to in the query. Neither does the specific application regulations provide for its dissemination, in this case Law 14/2008, of November 5, of the Antifraud Office of Catalonia.

The consultation considers whether the OAC's reasoned report affecting the City Council would be considered an administrative resolution of public relevance and whether, in its case, its publication would be necessary or mandatory for transparency purposes. In view of the City Council's statements, it is understood that it intends to base an eventual publication of the OAC's reasoned report on the provisions of Article 10.1.h) of the LTC.

Article 10.1 of the LTC obliges public administrations to make public, in application of the principle of transparency, certain information relating to decisions and actions with legal relevance. This information includes "administrative and judicial resolutions that may have public relevance and final judicial resolutions that affect the persons obliged to comply with this law, due to the exercise of the functions and responsibilities attributed to them" ( letter h)).

In order to provide elements that public administrations can take into consideration for the purposes of determining when it can be understood that administrative (and judicial) resolutions have public relevance, a matter referred to by the City Council, article 40 of Decree 8/ 2021, of February 9, on transparency and the right of access to public information (RLTC) establishes the following:

"1. For the purposes of letter h) of article 10.1 of Law 19/2014, of December 29, for assess the existence of the public relevance of administrative and judicial resolutions, public administrations must take into consideration, among others:

- a) the value, volume and quantity of the goods or services affected or potentially affected;
- b) the effect on the validity or interpretation of the provisions of a general nature;
- c) the impact on any of the legal assets and matters referred to in articles 36 to 38 of this decree;
- d) the establishment of a change or a novelty in the previous legal doctrine;
- e) the impact or interest of the public in general, beyond the impact or interest of the parties directly involved in the procedure or process, and
- f) the impact on matters in relation to which the legal system provides for public action, among others.

(...)."

Article 21.1.a) of Law 14/2008, of November 5, of the OAC, provides that "the director of the Anti-Fraud Office, in the exercise of his powers and as a result of the

actions carried out, issues a reasoned report that must be sent to the competent authority, which, subsequently and within thirty days, must inform the director of the Antifraud Office about the measures taken or, where appropriate, the reasons that prevent him from acting in accordance with the recommendations and formulated reminders.”

The Rules of action and internal regime of the OAC specify that "investigative files are closed through a reasoned resolution of the director, who can agree (...) the presentation of a reasoned report to the Administration corresponding local, for the purposes of what is established in article 6.a of Law 14/2008" (article 20.c)).

The aforementioned article 6.1.a) of Law 14/2008 provides that the OAC must "examine the performance of the local administration within the scope of its competences and, where appropriate, urge the local administration corresponding so that, in the exercise of its functions of internal control and supervision of economic, financial and budgetary management, it investigates and inspects, through the corresponding bodies, the possible cases of irregular use or destination of public funds, and also behaviors opposed to probity or contrary to the principles of objectivity, effectiveness and full submission to the law and the law, and inform the OAC of the results of the inspection and investigation."

The reasoned report referred to in the query, a copy of which is attached, is the reasoned resolution by which the director of the OAC closes the investigative actions carried out on the irregularities detected in the collection of assistance for participation in collegiate bodies by certain elected positions of the City Council during the previous term and which, in the opinion of the OAC, would lead to the full partial nullity of the plenary agreements that approved the assistance regime of the elected members and of the acts of authorization, provision, obligation and arrangement of payment derived from the aforementioned agreements.

In this reasoned report, the OAC sets out its criteria regarding the quantitative differences that plenary agreements can establish between elected members who receive assistance for competing in collegiate bodies, based on several court rulings and also in administrative doctrine.

In this sense, it is pointed out that jurisprudence and doctrine have come to consider that, consistent with the principles of equality and access to public functions and positions recognized in articles 14 and 23.2 of the EC, it is not possible to satisfy amounts different from the members of a collegiate body, given that they all devote the same effort and work to the preparation of the sessions of said body. Quantitative differentiation is only possible based on the bodies - it would be justified by the relevance of the collegiate body attended as an elected member - but not based on the people.

As a result of said actions, in this report the OAC urges the City Council to initiate an ex officio review procedure and, at the same time, a procedure for the reinstatement of the amounts improperly paid, which, according to the information of what is available, would have been carried out.

Taking into account the content of the reasoned report and the intended purpose of the LTC, it cannot be ruled out that the report in question could fit into this assumption of article 10.1.h) of the LTC. It is an administrative resolution that, despite not being drawn up by the City Council, is public information in accordance with the definition of article 2.b) of the LTC and the issues dealt with in it can be said to be of public interest or relevance, taking into account the criteria established in article 40.1 of the RTLIC.

Thus, it should be noted that the perception by some elected members of the City Council of different amounts with respect to those perceived by other members of the same corporation in terms of assistance for effective attendance at the same sessions of the collegiate bodies is not

would deal in the present case with an incidental issue, but would have occurred for a certain period of time, at least, according to the reasoned report of the OAC, from June 2015 to May 2021, moment when the Plenary, following another warning from the OAC, met in session extraordinary meeting agreed on the modification of the assistance regime for elected members of the Corporation provided for in the Plenary agreement of June 25, 2019.

It should also be borne in mind that, following the actions of the OAC, the validity of the plenary agreements that approved the assistance regime for elected members, specifically those adopted during the years 2015, 2018 and 2019, may be affected. In this sense, that the City Council should initiate an ex officio review procedure, for the purposes of, if the legal requirements are met, to declare the full partial nullity of said agreements.

Likewise, it must be taken into account that the criterion expressed in the reasoned report in relation to the legal regime of remuneration to the elected members of local corporations in terms of assistance for the effective participation in the sessions of the collegiate bodies it entails a change or innovation with respect to the interpretation that the City Council had been making on these same issues.

In turn, the interest of the reasoned report for the public in general seems undeniable, beyond the impact or interest of the parties directly involved in the OAC's investigative actions, given that their knowledge would allow the control of the management of the public resources that have been made available to the City Council and, more specifically, of the action taken by this local body in the face of a problematic situation such as that found by the OAC, purposes to which LTC itself responds.

And finally, it must be borne in mind that the controversial reasoned report deals with a subject - the remuneration of certain public positions - in relation to which the LTC expressly foresees its publication on the transparency portal. Thus, article 11.1.b) of the LTC establishes that "remuneration, compensation and per diems (...) of senior positions in the Public Administration (...)" must be made public. And, in accordance with Article 7 of the RLTC, for these purposes the elected officials of local corporations are considered senior officials. That is to say, the information on the compensations received by the elected members of the City Council in terms of effective attendance at the sessions of the collegiate bodies is public information that must be available to anyone.

For all that, it can be concluded that the reasoned report of the OAC that affects the City Council in the present case fits the concept of administrative resolution of public relevance referred to in article 10.1.h) of the LTC.

#### IV

Without prejudice to what has just been explained, it must be especially taken into account that, as provided for in the transparency legislation itself, the publication of administrative resolutions that may have public relevance, as could be the case of the reasoned report, it must be carried out anonymously.

This is clear from article 10.3 of the LTC, which provides that "in the case of letters f, g, h ii of section 1, the information must not include personal data or references." And also of article 40.4 of the RLTC, which specifies that in these cases "the publication must be made with the prior anonymization of the information on natural persons."

The question is precisely whether it is necessary to anonymize the OAC's reasoned report and which data should be deleted.

The aforementioned forecasts do not admit interpretative doubts regarding the fact that the administrative resolutions published on the basis of article 10.1.h) of the LTC must not include personal data.

It should be noted that in order for anonymization to be considered sufficient for the purposes of data protection legislation, it is necessary to ensure that the information that, in this case, is published or disseminated does not relate to an identified or identifiable natural person.

To determine if a natural person is identifiable "must be taken into account all the means, such as singularization, that can reasonably be used by the person responsible for the treatment or any other person to directly or indirectly identify the natural person. To determine whether there is a reasonable probability that means will be used to identify a natural person, all objective factors must be taken into account, such as the costs and time required for identification, taking into account both the technology available at the time of the treatment as technological advances" (consideration 26 RGPD).

In other words, in the publication of public information it is necessary to guarantee that the affected persons cannot be identified or become identifiable directly or indirectly without disproportionate efforts.

The RLTC collects these forecasts, while establishing that, for the purposes of transparency, anonymization is understood as "the elimination of the personal data of the natural persons affected contained in the information and any other information that may allow them to be identified directly or indirectly without disproportionate efforts, without prejudice to being able to maintain, where appropriate, the merely identifying data of the positions or personnel in the service of the public administrations that dictate or intervene in the administrative act" (article 70.6.a)).

Having examined the content of the reasoned report, it must be said that in this case it would be difficult to anonymize the information in the terms indicated, given that, despite the possible elimination of the identification data of the elected members who were involved in the investigative actions of the OAC, the rest of the information contained in the report would allow these people to be re-identified without disproportionate efforts. This would prevent publication for transparency purposes, given that, as has been seen, the publication of administrative resolutions that may have public relevance requires the prior anonymization of the data of those affected.

However, given the public interest of the issues discussed in said report, which has been mentioned in the previous section, in this specific case the option of disseminating on the electronic headquarters or website of the City Council an anonymized summary of the object of the reasoned report, as provided for in article 14.4 of the RLTC. Although proceeding this way would inevitably still do possible to identify the people affected, this option to publish a summary anonymized, from the point of view of the degree of impact or interference in the right to the protection of personal data of these people, would be acceptable taking into account the nature of the personal information that would be accessible in any case, this is retributive information (compensation) of elected officials that the LTC itself foresees must be the subject of active publicity (article 11.1.b) LTC).

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

## **Conclusions**

The reasoned report referred to in the inquiry may fit the concept of resolution administrative with public relevance, in accordance with the criteria established in article 40.1 of the RLTC.

The LTC requires the anonymization of personal data in the publication of administrative resolutions that may have public relevance. Since, in this case, despite the anonymization, the affected persons could be identifiable, it would be acceptable, from the point of view of data protection and transparency, to replace the publication of the report with an anonymized summary of their object

Barcelona, April 28, 2022

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