

IAI 9/2022

**Report issued at the request of the Commission for the Guarantee of the Right of Access to Public Information in relation to the claim against a city council for the denial of different reports from the corporation's legal services.**

The Commission for Guaranteeing the Right of Access to Public Information (GAIP) asks the Authority Catalan Data Protection Authority (APDCAT) to issue a report on the claim submitted against a city council for the denial of access to various reports from the corporation's legal services

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

**Background**

1. On November 3, 2021, a councilor requests from a city council a copy of 29 reports from the legal services of the corporation that he identifies with their corresponding file numbers.
2. On December 8, 2021, the councilor submits a claim to the GAIP against a town council in which he states that as councilor of the corporation he made a request for documentation and that after the one month period has passed had not received a response.
3. On December 17, 2021, the GAIP requests the city council to issue a report on the claim submitted, identify the third parties affected by the access and send the completed file to which it refers.
4. On January 19, 2022, the city council sends the GAIP the documentation it has given to the councilor regarding its request.
5. By email of January 26, 2022, the councilor informs the GAIP that the city council has sent him the requested reports except for one and requests that this report be requested from the city council.
6. On January 31, 2022, the GAIP sends the city council the request with the following text:  
"we are sending you, attached, the allegations presented by the person making the claim regarding the information you sent him. Given that the report (...) of the legal services would be missing, we ask that, within ten days, deliver the report to the complaining party and inform us about it, or tell us the reasons why prevent" .
7. On February 10, 2022, the city council sends GAIP a report on the reasons for denying access to file 100/2021, in which it states:

"(...)The report requested, in the terms set out above, refers explicitly to the alleged commission of criminal offenses by public officials. In this sense, when referring to personal data that are considered to be specially protected, access cannot be facilitated in accordance with article 164.3 a) of the TRMRLC.

Third.- The requested report, as well as other documents relating to the facts, in compliance with the duty established in article 262 of the Criminal Procedure Law, were referred to the Public Prosecutor's Office (DOC. 1). Consequently, the report forms part of the investigation proceedings initiated in this regard by the Public Prosecutor's Office, criminal investigation proceedings (...).Therefore, it corresponds to the Public Prosecutor's Office, in accordance with the regulatory rules of its statute, determine whether it can give you access to the requested report. It must be borne in mind that facilitating access to the requested information could harm the investigations of this body, and the subsequent exercise of the corresponding judicial actions. (...)"

8. On March 15, 2022, the GAIP addresses the request for a report to this Authority in accordance with the provisions of article 42.8 of Law 19/2014, of December 29, on transparency, access to public information and good governance.

## Legal Foundations

### I

In accordance with article 1 of Law 32/2010, of October 1, of the Catalan Data Protection Authority, the APDCAT is the independent body whose purpose is to guarantee, in the field of the competences of the Generalitat, the rights to the protection of personal data and access to the information linked to it.

Article 42.8 of Law 19/2014, of December 29, on transparency, access to public information and good governance, which regulates the claim against resolutions on access to public information, establishes that if the refusal has been based on the protection of personal data, the Commission must request a report from the Catalan Data Protection Authority, which must be issued within fifteen days.

For this reason, this report is issued exclusively with regard to the assessment of the incidence that the requested access may have with respect to the personal information of the persons affected, understood as any information about an identified or identifiable natural person, directly or indirectly, in particular through an identifier, such as a name, an identification number, location data, an online identifier or one or more elements of physical, physiological, genetic, psychological, economic, cultural or social of this person

(art. 4.1 of Regulation 2016/679, of April 27, 2016, relating to the protection of natural persons with regard to the processing of personal data and the free movement of such data and which repeals Directive 95 /46/CE (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

In the case before us, the councilor claims access to a report from the corporation's legal services. As indicated in the report issued by the city council at the request of the GAIP, the report that is the subject of the claim refers to events that affected certain people from the group of local police officers in the municipality, who could be constitutive of criminal offences, which is why it was proposed that they be brought to the attention of the Public Prosecutor in compliance with the duty provided for in article 262 of the Criminal Procedure Law. The city council founded the denial of access due to the fact that the report was sent to the Public Prosecutor's Office and forms part of the investigation proceedings initiated in this regard by the Public Prosecutor's Office (criminal investigation proceedings no. (...)).

From the point of view of data protection regulations, it should be taken into account that article 4.2) of the RGPD defines data processing as: "any operation or set of operations carried out on personal data or sets of personal data, whether 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 legitimation of data processing that is based on the need for one of the legal bases established in article 6.1 to apply. Specifically, section c) provides that the treatment will be lawful if "it is necessary for the fulfillment of a legal obligation applicable to the person responsible for the treatment".

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

The referral to the legitimate basis established in accordance with the internal law of the Member States concerned reference this article requires that the rule of development, when dealing with protection

of personal data of a fundamental right, has the status of law (Article 53 CE), as it has come to recognize article 8 of Organic Law 3/2018, of December 5, on data protection personal data and guarantee of digital rights (hereinafter, LOPDGDD).

For its part, article 86 of the RGPD provides that "the personal data of official documents in the possession of any public authority or public body or a private entity for the performance of a mission in the public interest may be communicated by said authority, organism or entity in accordance with the Law of the Union or Member States that applies to them in order to reconcile public access to official documents with the right to the protection of personal data under this Regulation."

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

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

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

In this case, the person requesting access has the status of councilor of the corporation, and therefore, the assessment that can be made regarding the obligation to provide him or not with personal information of third parties must be 'examine taking into account the right of access that the local regime regulations attribute to councilors - that is, Law 7/1985, of April 2, regulating the bases of the local regime (LRBRL) and the revised Text of the Municipal and Local Regime Law of Catalonia, approved by Legislative Decree 2/2003, of April 28 (TRLMRLC).

It is therefore appropriate to analyze whether the aforementioned local regime regulations can constitute a legitimate basis for access to the information claimed by the councilor.

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

### III

As this Authority has done on previous occasions (among others, the IAI reports 48/2019, IAI 52/2019, IAI 3/2020, IAI 41/2020, IAI 27/202, IAI 36/ 2021 or IAI 43/ 2021 which is

can be consulted on the website <http://apdcat.cat>), the local regime legislation recognizes a right of access to all elected officials, regardless of whether they are in the government team or in the opposition, to the information that their local corporation has and that may be necessary for the exercise of the functions that correspond to them.

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

In the same sense, the TRLMRLC, which regulates the access of councilors to municipal information in its article 164, is pronounced in the following terms:

"164.1 All members of local corporations have the right to obtain from the mayor or mayoress or the president, or from the governing commission, all the background, data or information that is in the possession of the corporation's services and are necessary for the development of their function.

164.2 Corporation services must provide information directly to corporation members when:

- a) Exercise delegated functions and the information refers to matters of their own responsibility.
- b) These are matters included in the agenda of the sessions of the collegiate bodies of which they are members.
- c) It is about access to information or documentation of the local corporation that is freely accessible to citizens.

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

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

164.4 The provisions of the previous sections are understood without prejudice to the obligation to provide all members of the corporation with complete documentation of all matters included in the agenda of the sessions of the collegiate bodies, from same moment of the call. When it is a matter covered by a declaration of urgency, the necessary documentation must be distributed, at least, to be able to have knowledge of the essential aspects of the matter under debate.

164.5 The members of the corporation have the right to obtain a copy of the documentation to which they have access. This copy can be obtained in paper format or in the technical support that allows access to the required information.

164.6 The members of the corporation must respect the confidentiality of the information to which they have access by virtue of their position if the fact of publishing it may harm the interests of the local entity or third parties."

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

However, it must be clarified, as this Authority has previously highlighted, that the right of access of councilors to certain information should not be configured as a right that is exercised in an indistinct or uniform manner by all councilors with regard to access to certain information, but it will be necessary to take into account the specific functions that may be attributed to councilors in relation to specific matters or areas, and therefore, access to certain information will always be relevant and when this access is necessary for the performance of the functions that may be attributed to a specific councillor. This consideration derives from article 164.1 of the TRLMRLC itself, transcribed, which stipulates that the information to which councilors must access must be "necessary for the performance of their function".

Article 164.2 of the TRLMRLC, cited, establishes in which cases the corporation's services must provide information directly to the elected members who may respond to the exercise of delegated functions, or to their status as members of a collegiate body, others. However, the direct access that derives from article 164.2 TRLMRLC does not mean that, in general, there is a right to indiscriminate access to the information referred to in this article but that before it is made available to councilors of this information, the city council must take the appropriate measures, which may vary in each case, in order to facilitate access to the information without violating the right to data protection, especially with regard to special categories of data or others that require special protection, such as in this case the information related to the possible commission of criminal offenses by the persons listed therein.

In the case we are dealing with, it does not seem that the information is related to functions that the councilor has delegated, since, according to the information in the file, it is a councilor without responsibilities in the government team.

#### IV

Outside of these cases of direct access, article 164.3 TRLMRLC establishes a procedure according to which requests for access to information held by the corporation's services carried out by councillors, must be subject to authorization by the president or the Board of Governors. These requests may be denied when any of the circumstances occur

provided for in articles 164.3 of the TRLMRLC, but they could also be denied, given the nature of the right to data protection (STC 292/2000), when there are other specific circumstances related to personal data that justify it, in particular under of the principle of data minimization, according to which "personal data will be adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed" (article 5.1.c)

RGPD)).

This principle implies, on the one hand, that access to municipal information that includes certain personal data, without the consent of those affected, must necessarily be linked to the exercise of the functions that correspond in each case to the councilor who is deal, in the terms provided for in the local regime legislation (whether they are part of the governing bodies or not).

Thus, the processing of personal data that may be carried out by councilors who do not have assigned government responsibilities, as it seems would happen in the present case, would find its justification, from the perspective of data protection, in the exercise of the functions attributed to them as members of collegiate bodies of the local entity itself and, in particular, in the functions of control and supervision of municipal action, such as the formulation of questions, interpellations, motions or even the motion of censure, which the local regime regulations attribute to them.

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

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

In the case at hand, in the weighing of the rights at stake, it must be taken into account that the councilor's request aims to access a report that refers to facts that affected certain people from the group of local police officers, which were considered to be constitutive of criminal offences, and which were brought to the attention of the Public Prosecutor. It is, therefore, information that contains personal data deserving of special protection in accordance with article 10 of the RGPD and article 10 of the LOPDGDD.

According to article 10 of the RGPD:

"The processing of personal data relating to convictions and criminal offenses or related security measures on the basis of article 6, section 1, can only be carried out under the supervision of public authorities or when authorized by Union Law or the Member States that establish adequate guarantees for the rights and freedoms of those interested. A complete record of criminal convictions can only be kept under the control of the public authorities."

On the other hand, article 10 of Law 3/2018, of LOPDGDD establishes the following:

1. The processing of personal data relating to convictions and criminal offences, as well as related precautionary and security procedures and measures, for purposes other than the prevention, investigation, detection or prosecution of criminal offenses or the execution of criminal sanctions, only it can be carried out when it is covered by a rule of Union Law, in this organic law or in other rules of legal rank.

(...)

This special protection is also contained in the regulations on access to public information (although it is not directly applicable in the present case). Thus article 23 of the LTC establishes that "Requests for access to public information must be denied if the information sought contains particularly protected personal data, such as those relating to ideology, trade union affiliation, religion, beliefs, racial origin, health and sex life, and also those relating to the commission of criminal or administrative offenses that do not entail a public reprimand to the offender, unless the affected party expressly consents to it by means of a written document that must accompany the request."

---

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

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

In the case we are dealing with, the councilor states that the information refers to possible illegal acts by local police officers in the exercise of their functions as public officials and that do not affect their private lives. Likewise, he states that he has no problem with the information being provided to him anonymously, but does not specify any other specific purpose that justifies access, beyond the control tasks of municipal action.

It does not seem that these generic tasks of control and supervision of municipal activity are a sufficient reason to justify full access to the requested report that contains particularly sensitive personal information, which may seriously affect the privacy of the persons affected, regardless of whether the violations committed were in the exercise of the actions as officials public have entrusted. In this sense, the disclosure of this information entails a significant interference in the right to the protection of personal data of the local police officers affected, to the extent that revealing the possible commission of criminal offenses can significantly affect both his professional sphere as the personal, (even in some cases the intimate) or social sphere.

It is also necessary to take into account the additional intrusion that may result from affecting the presumption of innocence of the people involved in the events recorded in the municipal report, which



prevails throughout the judicial procedure but which has special importance in the investigation or summary phase (in which it seems that the judicial proceedings are).

Therefore, in the absence of more information about the need to have this type of information personal, for the exercise of his functions of supervision and control of the municipal action it does not seem that full access of the councilor to the claimed report can be admitted.

In short, it would be necessary to deny the councilor access to the full report claimed since the information contained is deserving of special protection in accordance with the data protection regulations analyzed and there are no other circumstances that allow the right to prevail of access of the councilor over the right to the protection of the data of the persons interested.

In fact, the councilor himself states that he has no interest in knowing the personal data that may appear in the requested report. Certainly, access to the requested information prior to anonymization of the personal data would allow to avoid the limitations derived from the right to the protection of personal data.

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

Article 70.6 of Decree 8/2021, of February 9, on transparency and the right of access to public information, of additional application to the case at hand, specifies what should be understood by anonymization and by pseudonymisation of the information subject to access. Thus it establishes:

- a) anonymization: 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 data merely identifiers of the positions or personnel in the service of the public administrations that dictate or intervene in the administrative act.
- b) pseudonymization: the processing of personal data in such a way that they cannot be attributed to an interested person without using additional information, provided that this information is recorded separately and is subject to technical and organizational measures aimed at ensuring that personal data are not attribute to an identified or identifiable natural person.

In the case at hand, it does not seem, however, that the anonymization of the personal data of the local police officers contained in the claimed report can be done effectively, taking into consideration, on the one hand, that the local police are a very specific group within the municipal organization and, on the other hand, given the public significance that may have had the events that give rise to the municipal report (as can be seen from a simple search on the internet) it cannot be ruled out that the requesting councilor has prior information that allows him, without disproportionate efforts, relate the facts contained in the report to the specific people involved.

However, for the exercise of the control functions of municipal action in the face of a situation that has a clear impact on the operation of municipal services, the councilor, as a member of the corporation, must be able to access certain information that allows him (despite the possible risk of re-identification), to know what the problem is that has occurred and what has been the action of the municipal government to solve the existing problem. This would not include the detailed exposition of the facts, nor the identification of the people affected.

Therefore, although it is necessary to deny the councilor access to the full report claimed, it does not seem that it is possible to limit his access to information related to the problems produced and the actions of the municipal government in this respect that allow him to develop his control tasks of the municipal government. This except, of course, without prejudice to the fact that there may be additional limitations derived from summary secrecy, in the event that it has been agreed by the corresponding jurisdictional body.

All of this without prejudice to the fact that it may be applicable to the case at hand some other limit derived from the effect that the disclosure may have on the investigation of the facts (art. 21.1.b) of the LTC), which does not correspond to appreciate to this Authority.

## **Conclusions**

In accordance with data protection regulations, it would be necessary to deny the councilor access to the full report claimed since it contains data deserving of special protection and there are no other circumstances that allow the right of access to prevail councilor above the right to the protection of the data of the persons concerned.

The data protection regulations would not prevent the councilor's access to certain information contained in the claimed report that allows to know the problem produced and the municipal action to respond to it, without including the details of all the facts produced, nor the identity of the people affected.

Barcelona, April 1, 2022