

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 the denial by a city council of access to a copy of the complete file of the extension of the occupation of the post of City Council Auditor work.

The Commission for the Guarantee of the Right of Access to Public Information (GAIP) asks the Catalan Data Protection Authority (APDCAT) to issue a report on the claim submitted in relation to the denial by a city council of access to copy of the complete file of the extension in the occupation of the City Council Comptroller's job.

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 February 12, 2022, a citizen presented to a town hall a request for access to the following information:

"Copy of the Report issued by the accidental Secretary of the City Council (...) copy of any legal report that endorses the extension from the age of 65 of the Comptroller (...), as well as copies of the documents signed by the Mayor and Comptroller (file complete)"

2. On March 31, 2022, the same citizen presented a claim to the GAIP in which he states that the City Council has not responded to his request and claims the following:

"Copy with data protection of the extension document to the City Council auditor because you are 67 years old."

3. On April 12, 2022, the GAIP sends the claim to the city council and asks for a report setting out the factual background and the foundations of its position in relation to the claim, as well as the complete file and, if where applicable, specifying the third parties affected by the claimed access.

4. On April 29, 2022, the city council sent a letter to the GAIP in which it stated, with regard to the claim that is the subject of this report, the following considerations:

"Given that, as indicated above, the files are in the investigation phase and the compilation of all the information requested by the different departments affected by the requests for access to the public information, it has not been studied for the purposes of carrying out an exhaustive identification of the third parties affected by the access information to which it is claimed. It is for these reasons that we cannot transfer this information to today."

5. On May 5, 2022, the GAIP requests the city council to keep it informed about the completion of the transfer procedure to third parties and to send it the documentation that accredits it, as well as the allegations that may be made. This requirement is reiterated on May 30, 2022.
6. On June 30, 2022, the GAIP will send a letter to the City Council so that it communicates the request to the third parties affected by the claimed access, and informs them of the deadline for making the appropriate considerations.
7. On July 11, 2022, the City Council informs the GAIP that it has notified the affected person of the intended access but that the interested party has rejected the notification.
8. On July 21, 2022, the GAIP requests a report from 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 government

Legal Foundations

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 security 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 circulation of such data and by which Directive 95/46/CE (General Data Protection Regulation, hereafter RGPD) is repealed.

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

The data protection regulations, in accordance with what is established in articles 2.1 and 4.1) of the RGPD, apply to the treatments that are carried out on any information " *on an identified or identifiable natural person ("the interested party »); Any person whose identity can be determined, directly or indirectly, in particular by means of an identifier, such as a number, an identification number, location data, an online identifier or one or more elements of identity, shall be considered an identifiable physical person physical, physiological, genetic, psychological, economic, cultural or social of said person "*.

Article 4.2) of the RGPD considers " *treatment*": *any operation or set of operations carried out on personal data or sets of personal data, either by automated procedures or not, such as collection, registration, organization, structuring, conservation, adaptation or modification, extraction, consultation, use, communication by transmission, diffusion or any other form of enabling access, comparison or interconnection, limitation, deletion or destruction* .

In accordance with the provisions of article 5.1.a), any processing of personal data must be lawful, loyal and transparent in relation to the interested party and, in this sense, the RGPD establishes the need for some of the legal bases of article 6.1, among which section c) provides for the assumption that the treatment " *is necessary for the fulfillment of a legal obligation applicable to the person responsible for the treatment "*.

As established in article 6.3 of the RGPD and expressly included in article 8 of Organic Law 3/2018, of December 5, on the protection of personal data and guarantee of digital rights (LOPDGDD), data processing may only be considered based on these legal bases 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* .

It follows from all this that the applicant's access to the personal data that may contain the requested information 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 rank of law.

The right of access to information 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 (hereinafter, 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 of 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).

The information subject to the claim is public information for the purposes of article 2.b) of the LTC, and is subject to the right of access (article 18 of the LTC).

However, the right of access to public information is not absolute and can be denied or restricted for the reasons expressly established in the laws, as is the case of the limits of articles 23 and 24 of the LTC regarding the personal data.

III

The person making the claim requests that the city council provide him with the complete file regarding the extension of the time of continuation of the job of the Intervenor of that City Council.

Regarding the retirement of public employees, article 67 of Royal Legislative Decree 5/2015, of October 30, approving the revised text of the Law on the Basic Statute of Public Employees (EBEP), establishes:

"1. The retirement of the officials may be:

a) Voluntary , at the request of the official .

b) Compulsory , upon reaching the age legally established _

c) For the declaration of incapacity permanent for the exercise of its own functions body or scale, or for the recognition of a disability pension absolute permanent or incapacity total permanent in relation to the exercise of its functions body or scale

2. Retirement will proceed voluntary , at the request of the interested party , provided that the official meets the requirements and conditions established in the Social Security Regime that the be applicable.

3. Retirement compulsory will be declared ex officio when the official turns sixty - five years of age _

However , in the terms of the Public Service laws that are issued in development of this Statute , it will be possible request the extension of the stay in the active service as a maximum until it is fulfilled seventy years of age . The Administration Competent public must decide in a motivated way the acceptance or denial of the extension .

From what is provided in the two paragraphs previous ones they will stay excluding the officials who have rules state retirement specifics . _

4. Regardless of the legal retirement age forced established in section 3, the retirement age forced of official staff included in the General Social Security Scheme will , in any case, be the one provided by the rules said regulators _ regime for access to the retirement pension in su contributory modality without reducing coefficient due to age ”.

Also, article 232 of Decree 214/1990, of July 30, which approves the Regulations for staff at the service of local entities, establishes:

"Forcible retirement will be declared ex officio when the official reaches the age of 65 if the scale or category to which he belongs does not have another established. The active service situation can be extended, with the conditions and requirements established by law, in order to reach the minimum computable services to cause retirement liabilities."

In the same sense, article 38 of Legislative Decree 1/1997, of October 31, which approves the recasting in a single text of the precepts of certain legal texts in force in Catalonia in the field of public function, establishes:

- "1. Compulsory retirement is declared ex officio when the official reaches the legally determined age.*
- 2. Forced retirement may also be declared, either ex officio or at the request of the official and prior to the instruction of the corresponding file, when he is in a situation of permanent inability to carry out his duties or in a state of physical uselessness or weakening of the faculties that prevents him from performing his duties correctly. In the event that the official is covered by the general Social Security scheme, it is necessary to adhere to what is determined for these cases by this provision system.*
- 3. Civil servants may request an extension of their active service up to a maximum of seventy years of age. The body competent to declare retirements must resolve expressly and with reasons the granting or denial of the extension of the stay in active service, in accordance with one of the following causes:*
 - a) The ability to carry out the tasks and functions of the job held.*
 - b) Professional conduct, performance or achievement of objectives .*
 - c) The circumstances arising from the planning and rationalization of human resources.*

Likewise, the competent body can resolve, with reasons, the end of the authorized extension. Without prejudice to what is established in this section, the extension of the stay in the active service is granted whenever it is necessary to complete the minimum time of services to cause the right to the retirement pension, in accordance with the requirements and conditions established in the applicable social security regime. The provisions of this section are not applicable to civil servants who have specific retirement rules."

In the case we are dealing with, it must be made clear that the requested file is not available (since the City Council has not sent it to the GAIP), consequently the documents that make up it are unknown, although due to that it seems the resolution would have been favorable to the extension (if the resolution had been unfavorable to the extension request, the considerations made in this report would not be applicable).

In any case, in the event that a file for the extension of active service had been instructed, it can be foreseen, in accordance with the analyzed regulations, that this contains the request of the person who occupies the position of Interventor, the motivated resolution of the mayor

on this request, in addition, if it has been considered appropriate, of the corresponding evaluation reports of the request.

The city council could have requested the corresponding reports to determine the suitability for the performance of the duties and functions of the workplace, the professional conduct, the performance or the achievement of objectives, in accordance with what is established in the third section of article 38 of the recast in a single text of the precepts of certain legal texts in force in Catalonia in the field of public function, approved by Legislative Decree 1/1997, of October 31 .

At the outset, it should be borne in mind that article 23 of the LTC, relating to personal data deserving of special protection, establishes the following:

"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."

It cannot be ruled out that the file contains information related to the health of the person who occupies the intervention, such as a certificate of fitness for the performance of his functions, or other information related to his health necessary for the processing of the file.

As this Authority has previously highlighted, the psychological tests of aptitude and even the corresponding reports that include the condition of fit or unfit for the performance of certain functions, even if they do not include information about the reasons underlying the condition of suitable or not suitable, can be considered health data of the persons concerned. In this sense, if the resolution of the file were negative for health reasons, access to this information would have to be denied.

Therefore, in accordance with article 23 of LTC, if this type of information was part of the claimed file, access would have to be denied unless the affected party had expressly consented through a written document that accompanied the request

IV

In relation to the rest of the personal data that may be contained in the claimed documentation that are not considered to be particularly protected, it will be necessary to adhere to what is established in article 24 of the LTC, which establishes:

"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."

"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.*
- (...)."*

Section 1 of article 24 of the LTC allows access to the merely identifying data of employees and public officials that, by reason of their functions, may appear in the claimed documentation, unless there are specific circumstances that justify the prevalence of the right to data protection of the person or persons affected.

Article 70.2 of Decree 8/2021, of February 9, on transparency and the right of access to public information (RLTC) specifies what is meant by merely identifying personal data in the following terms:

"For the purposes of what is provided for in article 24.1 of Law 19/2014, of December 29, personal data 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 personnel in the service of public administrations, high positions and managerial staff of the public sector of public administrations.

In cases where the publication or access to an administrative document requires the identification of the author, the location data, the number of the national identity document or equivalent document must be removed in particular and the handwritten signature. If the signature is electronic, the electronically signed document must be published in such a way that the properties of the electronic certificate used for the signature cannot be accessed.

The location data must be deleted in the event that it is not merely identifying data of the author in his position of position or staff in the service of public administrations."

Therefore, and aside from the identification data of the person interested in the extension file (whose identity is already known by the person claiming), it would not be contrary to the right to data protection to facilitate access to the person claiming the merely identifying data of employees and public officials that may appear, for the purpose of the exercise of their functions, in the claimed documentation, in the terms indicated. In accordance with this, the name and surname of the people who processed and signed the file could be provided but not their handwritten signature, or other data such as the ID number, and, in the case of electronic signature of the documents it must not be possible to access the properties of the electronic certificate used for the signature.

The rest of the personal data that the requested file may contain can be expected to be related to the person who occupies the intervention position. Regarding these data that are not considered to be specially protected, it will be necessary to comply with the provisions of article 24.2 of the LTC, transcribed above.

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

In the case we are dealing with, the person making the claim does not provide any element to be taken into consideration regarding the purpose of the access which must be understood as framed within the purpose of the transparency law, which, in accordance with its article 1.2, is *"to establish a system of relations between people and the public administration and other obliged subjects, based on the knowledge of public activity, the encouragement of citizen participation, the improvement of the quality of public information and administrative management and the guarantee of the retention of accounts and responsibility in public management."*

In weighing up the rights of the interested party to access the claimed information and the right to data protection of the person occupying the position of Intervention, it is necessary to take into consideration on the one hand the possible harm that access would cause to this person and, on the other hand, if access to their personal information allows the purpose of access to be achieved, taking into account the principle of restrictive interpretation of the limits to access to public information and the principle of no need for justification.

With regard to the purpose of access, the control of the actions of the Administration in the matter of planning and management of human resources is one of the objectives that is intended with transparency (this is clear from the statement of reasons for the LTC).

As this Authority has previously highlighted, the importance of the functions entrusted to the municipal auditors and their significance in the organization cannot be ignored, criteria that must be assessed to consider this job as one of special responsibility.

In this sense, the Authority has considered, for example, (among others in the IAI 3/2019 report, which can be consulted on the APDCAT website www.apdcat.cat) that the regime of access to the remuneration of personnel who occupy positions of special trust, of special responsibility within the organization or at a high level in the organization's hierarchy, of free appointment, or that entail a high level of remuneration, may be equivalent to the high officials.

Consequently, with respect to municipal auditors, although the law does not expressly provide for the publication on the transparency portal of their remuneration, in the weighting of rights that must be done with respect to requests for access to information, when dealing with -se of jobs that, due to their uniqueness within the organization, and also due to the level of remuneration they usually bring associated, the knowledge of their remuneration may be relevant for the control of the use of public resources and, therefore, the result would be the prevalence of the public interest in its disclosure.

This same criterion can be extended with respect to other information related to the provision of services by the Municipal Interventor, such as the information that is the subject of the claim on which this report is issued.

From the point of view of transparency regulations, it may be relevant to know whether the municipal administration has managed the retirement process of the person occupying the position of intervention in accordance with current regulations, and if so whether processed the corresponding service extension file.

On the other hand, it is necessary to take into account the advertising regime that both the public service regulations and the transparency regulations (art. 9.1.e) LTC) establish for the job provision processes, given the will that the citizens can have knowledge of both the selective and provision processes that are carried out, as well as the result thereof. In the case we are dealing with, we are not faced with a provision process, but it is clear that the fact of prolonging the activity of the person who occupies the workplace affects the eventual existence or not of a new process of provision and, in addition, entails an exception to the general regime for the duration of the legal relationship established at the time of the provision of the post (in principle provided for only up to 65 years).

With regard to the impact on the privacy of the affected person, providing the person making the claim with the specific document of the request for the extension of the service, must not lead to a special prejudice in the privacy of the person who occupies the place of intervention and more in the case at hand in which, according to what is stated in the claim, the information that may be contained therein is already known by the person making the claim.

With regard to other information that may be contained in the file other than the application and that is not considered special categories of data, such as reports on professional conduct, performance or the achievement of objectives of the person entitled to the intervention, this information may have a significant impact on the privacy of the affected person, even though it is information directly related to the development of their work activity and respect to a workplace that, as has been explained, it has a special relevance for the municipal organization.

However, it must be borne in mind that we are dealing with the exercise of an exceptional mechanism provided for by current regulations, where the administration has a certain margin of discretion. And it is precisely in this area, in that of discretion in the use of public resources, and in compliance with the regulations governing the provision of public jobs, where the duty of transparency acquires greater significance.

All this without prejudice, of course, to the need to transfer the request, and if applicable, the claim, to the affected person so that he can make the considerations he deems appropriate linked to his particular situation.

Therefore, the result of the weighting of the rights at stake is favorable to access to public information of the person making the claim.

conclusion

The data protection regulations do not prevent the person making the claim from providing the service extension file corresponding to the person occupying the position of Intervention, omitting the information that contains special categories of data, specifically the person's health data affected

Barcelona August 30, 2022

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