

Report issued at the request of the Commission for the Guarantee of the Right of Access to Public Information in relation to the claim presented against a town hall for denying access to the file of an economic activity carried out in the municipality

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 presented against a town hall for denying access to the file of an economic activity carried out in the municipality.

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

Background

1. On August 1, 2022, a citizen writes to a town hall requesting the following public information:

"I explain: As the owner of a property located in (...) and due to the nuisance of the Company located at n° 53 of the same street.

Request : Answer me in writing to the following questions.

- 1.- If before establishing the company they must inform the nearest neighbor.*
- 2.- Access to the processing file as an interested party.*
- 3.- Do they have to have an assigned schedule? Since they are at home, they sometimes work late and on weekends."*

2. On August 3, 2022, the City Council resolves the aforementioned request for access to public information as follows:

"1. Since it is an activity classified by annex III according to law 20/2009, on the procedures for processing activities before the administration, it is not considered an activity with an environmental impact, so the processing does not require d 'prior authorizations, nor protection protocols for nearby farms.

2. According to the current data protection law, the data on the file are confidential. From territorial services we inform you that the activity on the Way of the Cross, 53 is part of a communication process for the development of the activity in front of the City Council (...).

3. The municipality does not have an ordinance regulating industrial schedules. What must be fulfilled at all times by the owner of the activity is the Police and good governance ordinance. Where it says: (...)."

3. On August 6, 2022, the citizen filed a complaint with the GAIP against the City Council for denying access to the requested file.

4. On August 11, 2022, the GAIP forwards the claim to the City Council, informing it of the processing of the mediation procedure at the express request of the complaining party, and requiring it to issue report in which they base their positions, as well as the complete file relating to the request for access to public information, the identification of the third parties who are affected by the requested access, as well as the person or persons who they will represent them in the mediation session.

5. On August 18, 2022, the City Council responds to GAIP's request by sending it the file relating to the access request that is the subject of this claim.

The file contains the report issued by a technician from the secretarial area, in which, for the purposes of interest, it appears that, in response to a previous request for information from the person now claiming in which he asked *"the data of the person or company on the street (...)"*, the City Council informed her in the following terms:

"- The City Council cannot provide personal data in this case, according to the which establishes the General Data Protection Regulation 2016/679 and Organic Law 3/2018, of December 5, on Personal Data Protection and guarantee of digital rights.

- With regard to the activity that can be carried out there, according to the information obtained from business portals, it is listed in the name of the company: (...)."

In this same report, the City Council informs the GAIP that the person who could be affected by the access to the requested information is *"Mrs. (...) that holds the ownership of the activity"*.

6. On August 24, 2022, the GAIP requests this Authority to issue the report provided for in article 42.8 of Law 19/2014, of December 29, on transparency, access to public information and good governance, in relation to the claim presented.

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 the LTC, which regulates the complaint against resolutions regarding access to public information, establishes that if the refusal is based on the protection of personal data, the Commission must request a report to 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 (article 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 repeals Directive 95/46/EC (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

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."*

The RGPD provides that all processing of personal data must be lawful (Article 5.1.a)) and, in this sense, establishes a system of legitimizing data processing based on the need for one of the legal bases to be met established in its article 6.1. 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"*.

As can be seen 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 guarantee of digital rights (LOPDGDD), the processing of data it can only be considered based on this legal basis of article 6.1.c) of the RGPD when this is 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 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.”

Law 19/2014, of December 29, on transparency, access to public information and good governance (LTC), aims to regulate and guarantee the transparency of public activity.

Article 18 of the LTC recognizes the right of people 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 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 power as a result of its activity or the exercise of its functions , including that supplied by the other obliged subjects in accordance with the provisions of this law”*.

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 that the City Council has regarding the exercise of an industrial economic activity in its municipality that is the subject of a claim 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, which establishes, as a general criterion, that the right of access to public information can only be denied or restricted for the reasons expressly established by law (article 20 et seq. LTC) .

Specifically, and with regard to the right to the protection of personal data, it is necessary to take into account what is established in articles 23 and 24 of the LTC, as well as the principles of the personal data protection regulations.

III

As can be seen from the statements of the complaining party and the set of information contained in the file, the object of this claim is access to the file relating to an economic activity carried out in the municipality.

According to the information provided by the City Council, according to the regulations applicable to the present case, the municipal intervention regime applicable to the establishment in which the activity in question is carried out is that of communication.

In this procedure, the owner of the economic activity informs the City Council of the necessary data for the start of the economic activity in the establishment and must attach a technical certificate certifying compliance with the regulatory requirements (article 32.1 Law 18/2020, of December 28, facilitating economic activity).

communication, submitted in accordance with the provisions of current regulations, immediately qualifies for the exercise of the activity under the responsibility of the owner and the competent technician who signs the technical documentation, and empowers the City Council to carry out any action of verification (article 32.1 Law 18/2020).

In view of this, despite not knowing the specific documentation that may be contained in the file subject to access, it can be anticipated that, as regards personal data, it will contain data on the owner of the economic activity - if it is a natural person - and also details of the person who signs the technical certificate that the holder must attach to the communication.

In accordance with article 4.j) of Law 18/2020, the owner of an economic activity can be the *"natural or legal person who has a sufficient title, according to current regulations, for the exercise or the "exploitation of an economic activity, whether for profit or not"*.

In the present case and from the information available, everything seems to indicate that the owner of the economic activity referred to in the requested file is a limited company.

It must be taken into consideration that the RGPD extends its scope of protection to personal data understood as all information about an identified or identifiable natural person (Article 4.1 of the RGPD), so they are excluded from this scope of protection the data of legal entities. This is specified in the RGPD itself, establishing that *"the protection granted by this Regulation must apply to natural persons, regardless of their nationality or place of residence, in relation to the treatment of their personal data. This Regulation does not regulate the processing of personal data relating to legal entities and in particular to companies established as legal entities, including the number and form of the legal entity and its contact details"* (Consideration 14).

Therefore, to the extent that the owner of the economic activity would be a legal person, given that legal persons are not holders of the right to the protection of personal data, there would be no inconvenience in providing the person claiming the information regarding said company that may appear in the requested file.

IV

It is not superfluous to point out, in the event that the owner of the economic activity turns out to be a natural person, in the sense that it is not only the owners and/or shareholders of the company that owns an economic activity, but that it was a natural person carrying out the activity as an individual or self-employed person, the data protection regulations would indeed apply in this case.

If so, it would be necessary to examine whether or not the fundamental right to the protection of personal data of the holder, a natural person, would justify a limitation of the claimant's right of access to the information contained in the disputed file.

In this sense, taking into account that this would not be data deserving of special protection, the intended access would require a reasoned weighting between the public interest in its disclosure and the rights of the persons affected, as provided in article 24.2 of the LTC:

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

According to article 18.2 of the LTC, the exercise of the right of access *"is not conditional on the concurrence of a personal interest, is not subject to motivation and does not require the invocation of any rule"*, although and that certainly knowing the purpose of the access can be an element that is taken into account when making the necessary weighting.

In the case at hand, it must be taken into consideration that the person requesting access to the file is the person who resides on the property adjacent to the one where the economic activity is carried out. In the request for access and in the corresponding complaint, the person making the claim states that the noise derived from their own activity and the frequent traffic of trucks and vans entering and leaving, as well as the smells of food, cause them discomfort, and adds that it is intended to check whether the disputed activity can really be carried out in a residential area.

In view of these manifestations, the purpose of the intended access would be justified in the inspection and control of municipal administrative action in this area of activity and, specifically, to verify that the requirements that the regulations of application imposes to carry out this type of economic activities in the municipality. In this sense, it may be of interest or relevance to know who has communicated the start of the economic activity and therefore who has been allowed to carry out such activity in order to evaluate how the City Council has acted with respect to this specific person.

In addition, it should be borne in mind that, in matters of atmospheric pollution (including pollution due to bad smells), the right of access to information is of particular relevance, given the recognition of public action (article 3 bis Law 22/1983, of 21 November, on the protection of the atmospheric environment), from which any citizen can demand the action of the Public Administration in this matter, therefore, demand compliance with the legislation. Consequently, public action can allow anyone to access public information for that purpose.

From the point of view of the affected person and with regard to the possible harm that access to their data that could be included in the file could cause for their privacy, it should be borne in mind that it would not be data that its nature requires, a priori, specific protection or confidentiality and that it would in any case be information linked to the exercise of an economic activity, with which the effect on your personal life would be less.

In addition, given the concurrent circumstances in the present case, such as the population density of the municipality in which the economic activity is carried out, that this is carried out on the property adjacent to that of the claimant and that it is a residential area, it cannot be ruled out that the claimant has other means that allow him to know the identity of the natural person holding the economic activity, if that were the case.

However, the application of the principle of minimization (article 5.1.c) RGPD), according to which the personal data must be the minimum and necessary to achieve the intended purpose of the access, would lead us to conclude that the information to be provided, in terms of identifying data, should be limited to the name and surname of the owner of the activity, not the ID number or other identification or contact data that are not strictly professional.

v

As has been seen, apart from the information about the owner of the economic activity, it is foreseeable that the requested file may also contain data about the person who signs the technical certificate that the holder must attach to the notification of the start of activity (article 32 Law 18/2020).

Access to this type of information that may be available to the City Council requires a reasoned weighting between the public interest in its disclosure and the rights of the affected persons, as provided in article 24.2 of the LTC, previously cited.

For the purposes of said weighting, it is necessary to take into consideration the purpose of controlling the legality of the economic activity intended by the person making the claim to which we have referred previously, which is in line with the purpose of the transparency regulations (article 1.2 LTC).

In accordance with article 4.b) of Law 18/2020, the technical certificate consists of a document signed by the competent technician that accredits the regulatory compliance of an activity in an establishment on the date of its issuance.

Thus, as stated in the standardized model, by means of this document the technician certifies, among other aspects, that the activity meets all the environmental requirements and, in particular, that said activity does not produce nuisance due to odors and which meets the requirements regarding acoustic pollution, noise or vibrations, in accordance with the applicable regulations, among others.

Bearing in mind that in the present case the claimant alleges certain nuisances due to smells and noises caused by the activity, it may be of interest to know not only the content of the certificate in question, but also the identity of the technician who, in practice of his professional activity, certifies compliance with the applicable regulations for the exercise of said economic activity in a residential area.

From the point of view of data protection, handing over this information would lead to an interference with the right to data protection of the competent technician, given that it would make it possible to know not only their identity but also a certain action in relation

to certain facts that may result controversial But it should be borne in mind that it would in any case be about aspects linked to his professional activity and exercise of the profession as a competent technician, so the effect on his personal life would be less.

Point out that, based on the information available, the technician's data contained in the certificate would include identification and contact data, qualifications and affiliation.

Emphasize that the specific regulations that regulate professional associations determine the minimum information of registered professionals that, through the single window in the Register of registered professionals, must be the subject of active advertising for the best defense of rights of users and consumers. Among this information we find "*names and surnames of the registered professionals, registration number, official titles of those in possession, professional domicile and status of professional qualification*" (article 10.2 of Law 2/1974, of February 13, on professional colleges).

Thus, the certificate includes information on the technician (identity, degree and membership number, address, as long as he is a professional) which must be available to any citizen and, consequently, could also be given to the person making the claim .

Regarding the contact data relating to the telephone and electronic address, it should be borne in mind that article 19.2 of the LOPDGDD establishes a presumption of the existence of a legitimate interest in terms of access to this type information from liberal professionals when the contact details refer to them only in this capacity and are not processed to establish a relationship with them as natural persons. That being the case, the data protection regulations would not be an impediment to giving access to the person claiming this data.

On the other hand, by application of the principle of data minimization (Article 5.1.b) RGPD), access should only cover the aforementioned information and not other identifying data such as the ID number and the technician's signature contained in the technical certificate.

conclusion

The data protection regulations do not prevent the claimant's access to the information relating to the owner of the economic activity contained in the claimed file, insofar as it would be a legal person.

In the event that the owner of the activity was a natural person, taking into account the concurrent circumstances, the person making the claim could also access it, except for the data relating to the ID number or other identification or contact data that are not strictly professional.

The person making the claim has the right to access the information contained in the file about the professional who signs the technical certificate, except for the data relating to their ID number and signature.

Barcelona, September 27, 2022

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