

## **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 lack of response by a City Council of information on access to a copy of the file of a selective process at the request of a participating person**

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 in relation to the lack of response by the City Council of the 'access to information on access to a file relating to the selective process of internal promotion, labor personnel, from administrative assistant C2 to administrative C1 of the City Council.

Having analyzed the request, which is accompanied by a copy of the file of the claim presented, in accordance with the report of the Legal Counsel, the following is reported.

### **Background**

1. On June 21, 2019, the claimant, a City Council employee who participated in the internal promotion process to which the request refers, submitted the access request to the City Council to the following information:

*"As an interested party in file 2018-1374, given that I participated in the selective process of internal promotion, labor personnel, from administrative assistant C2 to administrative C1 ." Request: "copy of the entire administrative file in accordance with article 9e of Law 19/2014, of December 29, on transparency, access to public information and good governance, respecting the deadline to resolve this request in accordance with the provisions of article 33 of the same law".*

2. On March 29, 2022, reiterate your request for access, before the City Council, in the following terms:

*"After 3 years of having requested a copy of the administrative file 2018/1374, exactly on 6/21/2019, RE 2019/4059, I have not yet received a written response or a verbal response as an interested party in the selective internal promotion process . This fact violates Law 39/2015 on administrative procedure and article 9 of Law 19/2014, of December 29, on transparency, access to public information and good governance". And request: "COPY OF FILE 2018/1374 requested 3 years agojjj".*

3. On July 5, 2022, the claimant submits a claim to the GAIP stating the following:

*"As an interested party in a selective internal promotion process at the City Council of (name of the City Council), on 6/21/2019 I requested a copy of the administrative file (...). On 3/29/2022 I requested it again and I still have not received a response from the City Council (name of the City Council)."*

4 . On July 8, 2022, the GAIP sends the claim to the City Council and requests a report setting out the factual background and the foundations of its position in relation to the three claims, as well as the complete files and, if applicable , specifying the third parties affected by the claimed access.

5. On October 11, 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 the 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 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 (hereafter LTC).

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 object of the claim is the request for access to the complete file of a selection process for internal promotion personnel, labor personnel, from administrative assistant C2 to administrative C1 of the claimed city council, in the which the person making the claim declares to have participated.

The data protection regulations, in accordance with what is established in articles 2.1 and 4.1) of the RGD, 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 RGD 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 RGD establishes the need to participate in 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 can be seen from article 6.3 of the RGD 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 (hereinafter the LOPDGDD), the processing of data can only be considered based on these legal bases of article 6.1. c) and e) of the RGD when so established by a rule with the rank of law.

For its part, article 86 of the RGD 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 claimant'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) RGD), 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).*

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

The information on the data relating to natural persons contained in a selection process file constitutes personal data and 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).

### III

Before starting to analyze the merits of the claim, it is appropriate to determine the legal regime applicable to the request for access to personnel selection files by a participating person.

The first additional provision of the LTC establishes that "*the access of the interested parties to the documents of the administrative procedures in progress is governed by what is determined by the legislation on legal regime and administrative procedure*" .

In the case at hand, this Authority does not know whether at the time of the submission of the request for access by the claimant (June 21, 2019 and March 29, 2022) the selection procedure had ended or no.

Thus, in the event that the selection process had not ended at the time when the access request was submitted or had ended but the deadline for the filing of the administrative appeal or administrative dispute was still open, it would be necessary to have given that this should be governed by the right of access that regulates administrative procedure regulations. On the other hand, in the event that the process had ended, the transparency regime should be applied. In this case, in the absence of more information, mention will be made of both cases.

Thus, if the administrative procedure regulations are applied, it must be remembered that the person who participates in a personnel selection process has the status of an interested person, to the extent that he may be affected by the result of this administrative procedure (Article 4 Law 39/2015, of October 1, of the common administrative procedure of public administrations (LPAC AP)).

In this regard, article 53.1.a) of Law 39/2015, of October 1, on Administrative Procedure common of public administrations (LPAC) recognizes the people interested in an administrative procedure the right to access and obtain a copy of the documents contained in the procedures in which they have this condition. This right of access is directly linked to the

right of defense of the person concerned and is formulated in quite broad terms. However, this does not mean that it is an absolute right but that, when it conflicts with other rights, such as the fundamental right to the protection of personal data of third parties (Article 18 EC), it will be necessary to weigh the different rights at stake, in order to decide which should prevail and to what extent.

Thus, the LPAC establishes that it is necessary to apply the limitations provided for in the transparency legislation, for example, when it regulates the obtaining of copies or access to the file of the persons interested in the hearing procedure provided for in the article 82.1, or when it regulates the right of interested persons to request the issuance of authentic copies of public administrative documents issued by the public administrations provided for in article 27.4.

At the outset, there would be no problem in providing the person requesting access and a copy of that personnel selection file documentation that does not contain personal data (Article 4.1 RGPD) merely identifying information of the authorities and the staff at the service of the public administrations responsible for processing the procedures (article 53.1.b) LPAC) the information that has been the subject of publication in accordance with the regulations in force with respect to other participants, and that documentation of the file containing exclusively your personal data, on the basis of article 15 of the RGPD, which regulates the right of access of the affected person to their own personal data, such as, for example, the documentation relating to your curriculum vitae, exams or tests that, if applicable, you have taken, to the evaluation made by the selection board in this regard, etc. However, with respect to the rest of the documentation contained in the file of the selection process that contains information about other people than the applicant, a different analysis must be made, based on what is established in articles 23 and 24 of the 'LTC.

This same analysis, from the point of view of the limitations provided for in articles 23 and 24 of Law 19/2014, would also be applicable in the event that access is governed directly by the transparency regulations.

#### IV

Article 23 of the LTC provides:

*"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."*

In similar terms, article 15.1 of Law 19/2013, of December 9, on transparency, access to public information and good governance (hereafter, the LT) in the wording given by the eleventh final provision of the 'LOPDGDD has:

*"If the requested information contained specially protected data referred to in section 2 of article 7 of Organic Law 15/1999, of December 13, on the Protection of Personal Data, access may only be authorized in the event of that there is the express and*

*written consent of the affected person, unless said affected person had made the data manifestly public before access was requested.*

*If the information includes specially protected data referred to in section 3 of article 7 of Organic Law 15/1999, of December 13, or data relating to the commission of criminal or administrative offenses that did not lead to a public reprimand to the offender, access can only be authorized if the express consent of the affected person is obtained or if the latter is covered by a rule with the rank of law."*

Article 70.1 of Decree 8/2021, of February 9, on transparency and the right of access to public information provides:

*"For the purposes of what is provided for in article 23 of Law 19/2014, of December 29, it is up to the person requesting to provide the express written consent of the persons holding the personal data affected by the access alone. The public administrations can transfer the request and the consent to the person holding the data in order to certify the written consent provided, in case of doubt about its veracity.*

It does not appear from the information available that the person making the claim has the consent of the other affected persons.

In the event that the public information that is requested contains information from specially protected categories, such as health data or data relating to criminal or administrative offenses and convictions, the confidentiality of this information must be preserved and exclude it from the claimant's access, unless, in the absence of the express consent of the affected persons, which is not stated in this case, any other of the circumstances provided for in the aforementioned article 15.1 occurs.

Regarding the personal information that may be contained in relation to these tests, we note that in the initial request of June 21, 2019, the person making the claim requests the complete file.

In this case, the City Council should deny access to the documentation that is part of the call file that contains particularly protected personal data (for example those linked to psychotechnical tests, disability situations, adaptations etc.), unless the express and written consent of the affected persons is available.

## **v**

Regarding access to the rest of the information in the file that does not contain particularly protected personal data, it is necessary to balance the right to data protection of the affected persons, and the public interest in the disclosure of the information in accordance with the provisions of article 24 of the LTC, according to which:

*"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 (specially protected data), access to the information can be given, with the previous reasoned weighting of the public interest in the disclosure and the rights of the affected people 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.*
- (...)." "*

At the outset, with regard to the personal information itself, it should be remembered that article 15 of the RGPD regulates the right of access to one's personal information, so that, in the case examined, the claimant has the right to access all the information that appears on your person in the file processed by the City Council, in relation to the call for personnel selection in which you participated as an applicant.

With regard to the merely identifying information of the people who have intervened in the processing of the selection process by reason of their position (article 24.1 of the LTC). Article 70.2 of the RLTC is merely identifying personal data *"the ones consisting of the name and surname, the position or position held, body and scale, the functions performed and the telephone and the addresses, postal and electronic, of professional contact, referring to the personnel in the service of the public administrations, high positions and managerial personnel of the public sector of public administrations.(...)"*.

In this case, there would be no problem in providing the interested person with the merely identifying information of the people who have intervened in the processing of the selection process by reason of their position.

With regard to the information that has been the subject of publication in the course of the selection process that may be contained in the file, article 9.1.e) of the LTC establishes the obligation to publish *"the calls and the results of selective processes of staff provision and promotion"* .

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

In accordance with what has been said, in principle it does not seem that facilitating access to information that has been the subject of dissemination during the course of the selective process that may be contained in the file should have particular relevance with regard to the right to the protection of personal data of the affected persons, particularly in this case where the person requesting access has participated in this selective process, so it is likely that it is already known to them.

## VI

With regard to the rest of the information linked to the people who have participated in the selection process apart from the person making the claim, for the purposes of granting access, a reasoned weighting will need to be done between the public interest in the disclosure of the information and rights of the affected persons, in accordance with the provisions of article 24.2 of the LTC.

In this case, the person making the claim would have participated in the internal promotion process. In this sense, the claimant's status as an interested party with respect to the internal promotion procedure grants him or her a reinforced or privileged right of access with respect to potential applicants for information who have not participated in that selective process.

In this sense, article 22.1 of the LTC provides that: *"The limits applied to the right of access to public information must be proportional to the object and purpose of protection. The application of these limits must take into account the circumstances of each specific case, especially the concurrence of a higher public or private interest that justifies access to the information."*

Although the LTC does not require the information requester to state the reasons justifying the exercise of the right of access to public information (art. 18.2 LTC), the purpose of the access is one of the circumstances that article 24.2 of the LTC establishes as a weighting criterion.

The private or particular dimension of the right of access to public information is specified by allowing people to access information that may be relevant to their sphere of particular interests and, in this sense, the purpose of access plays an essential role when weighing up the different rights at stake. In fact, the particular interest is provided as a weighting criterion (art. 15.3.b) LT, by establishing that it is necessary to take into consideration *" The justification by the petitioners of their petition in the exercise of a right (...) ."*

In the case at hand, knowing the motivation and purpose of the access is an element to be taken into account, for the purposes of weighting the access to personal information of the other people who participated in the selection process together with the person making the claim . The person claiming does not motivate his request for access to the complete file, however, it seems clear that he is basing it on a personal or particular interest, given his status as a participant in the selection process.

When weighing the rights at stake, the principle of data minimization (Article 5.1.c) RGPD) must be taken into account, according to which the data to be processed must be adequate, relevant and necessary for the fulfillment of the purpose according to which the access occurs, in this case transparency in the selective process. For weighting purposes and in accordance with this principle, it would be necessary to clearly differentiate between the personal information related to the candidates who passed the opposition or who, at least, obtained a better result than the person making the claim, from the information related to the rest of participants in the procedure who did not pass the selection process.

In this case, on the one hand, it may be justified to access certain information about the qualifications of the candidate who obtains the offered position or of the candidates who

would have obtained a better qualification than the person making the claim, as a control mechanism regarding actions that may have harmed the person making the claim.

On the other hand, it does not seem justified to give access to the personal information of applicants who have not passed the competitive procedure or have not participated in all the tests, since this information would be irrelevant to achieve the alleged purpose pursued by the person making the claim. In this case, the impact on your right to the protection of personal data does not seem justified. In this sense, it is not clear what impact it may have on the control of the actions of the Administration responsible for the competitive procedure, accessing the personal information (certificates and diplomas, academic and employment information, curriculum vitae ...) of the people who have not been finally selected for the position, or who have not obtained a score higher than that of the person making the claim.

Therefore, given the weighting of Article 24.2 LTC, from the perspective of data protection it does not seem justified to give access to the information, documentation, reports or evaluations that may be contained in the file relating to applicants not selected in advance of the claimant.

## VII

Having said that, I respect the documentation relating to people who have obtained a better result than the person making the claim (the candidate person who would eventually have been selected and the persons who would fill the positions ahead of the claimant) from the perspective of the weighting of Article 24.2 LTC, the analysis must be different.

In order to control the actions carried out by the Administration in the field of the selection process, which is governed by the principles of merit, capacity and equality, it may be relevant, with respect to the candidate finally chosen, to know the acts of 'evaluation or the equivalent evaluation documents of the merits, as well as the evaluative elements that the court has taken in relation to this person. Thus, it would be justified to facilitate the score obtained by the selected candidate in relation to the alleged merits or the curricular or professional aspects that the court has assessed.

Knowing the assessed elements and the score obtained by the people in a better position than the person claiming in the final results of the process, in relation to professional experience, academic training or in relation to the tests carried out, would provide sufficient information if what is intended is to detect possible arbitrary actions on the part of the body in charge of making the selection, which should act within the parameters of technical discretion attributed to it.

In this sense, as regards the curricular documentation of these participants, despite the fact that it may contain personal information of a different nature that may allow the preparation of an academic, work and professional profile of the candidates and, therefore, facilitate - it would lead to a strong impact on your right to the protection of personal data, in a case like the one examined, it must be considered that their knowledge, together with the identity of the candidates, is indispensable to be able to defend your rights regarding to the legality of the selection process and to be able to detect, where appropriate, arbitrary treatment in the assessment of this profile, which could have harmed the interests of the person making the claim.

This, without prejudice to the fact that if this documentation contains other personal information that is not relevant to achieve the intended purpose, it should be excluded from access. For example, the documents contained in the file about the candidates we refer to (applications for participation in the selection process, affidavits, diplomas and certificates, academic and employment information, etc.), provide detailed information about the profile, training and professional career of a candidate, as well as other aspects of skills and competences required for the development of the job offered, but the documents that are part of the file may also include other data such as address, ID, phone, no. of SS or date of birth, which are not relevant for the purposes we are concerned with, taking into account the principle of minimization (art. 5.1.c) RGPD).

In short, it may be relevant to know the data that allows you to accredit the merits assessed by the court, but not other personal data that do not provide relevant information in relation to the assessment of these merits.

Thus, taking into account that access must be limited to the information strictly necessary to provide a satisfactory response to the exercise of the aforementioned legitimate purpose, access to the documentation presented and to the CVs of the persons affected should be limited to data relating to training, professional experience and other occupational data that have been taken into account in the assessment of the merits of these candidates. It will therefore be necessary to omit, prior to access, personal data ( identifying or other categories) that are unnecessary, irrelevant or not indispensable for the intended purpose.

With regard to access to the evidence that makes up the call file and the court's qualifications, it also seems clear that access to this information can be relevant to the defense of the claimant's rights.

These considerations should lead to a weighting in favor of the claimant's right to access the tests, exercises and qualifications of the person who has obtained the position and of the persons who have obtained a higher qualification than the claimant and in the terms indicated, since this information may be relevant for the verification and control of the actions of the administration responsible for the selection process, excluding that information relating to tests which by their nature may contain particularly protected data (for example, if there has been a psychotechnical test, or the parts of a personal interview that aim to specify or contrast certain aspects of the psychological profile of applicants, detected as a result of a psychotechnical test).

All this, without prejudice to the fact that certain personal circumstances of the candidates could justify the limitation of the claimant's right of access.

## **conclusion**

The person making the claim has the right to access the information contained in the file of the call in which they have participated, excluding documentation containing specially protected personal data, as well as those identifying or other data that are unnecessary to achieve the purpose pursued

The claimant's access to information relating to applicants who have obtained a final score lower than that of the claimant is not justified, except for that which has been the subject of publication in accordance with current regulations.

Barcelona, November 9, 2022

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