

Legal report issued at the request of the Commission for the Guarantee of the Right of Access to Public Information in relation to the claim for the lack of response of a City Council to the request for access to information relating to the selective processes of the personnel of the City Council

The Commission for the Guarantee of the Right of Access to Public Information (GAIP) is asking the Catalan Data Protection Authority (APDCAT) to issue a report on a claim submitted in relation to a City Council's lack of response to the request for access to information relating to the City Council's staff selection processes.

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 Adviser, I issue the following report:

Background

1. On April 4, 2022, a request is presented to a City Council in which access is requested to a copy of "[...] *the tests carried out in the selective processes to access the places of ALL the staff currently working in this town hall according to the staff template that was sent to me with a certificate, as well as the bases of each selection process, the appropriate publications in the official newspapers and the contracts of each one*".
2. On August 8, 2022, the applicant submits a claim to the GAIP in which he claims access to the "*evidence of the City Council's staff selection processes*".
3. On August 18, 2022, the GAIP will send the claim to the City Council, asking for a report setting out the factual background and the basis for its position in relation to the claim, as well as the complete file and, where appropriate, specifying the third parties affected by the claimed access. The request to the City Council is reiterated on September 29, 2022.

The file sent does not include the City Council's response to the GAIP's request.

4. 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 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 complaints against resolutions regarding 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 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 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 can 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* .

Public access to documents 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 the "exercise of his 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 case we are dealing with, access is requested to certain information relating to the City Council's staff selection processes . This information must be considered public in accordance with article 2.b) of the LTC as it is information held by the City Council as a result of the exercise of its powers, and subject to the right of access provided for article 18 of the LTC.

It must be noted, however, that this right of access is not absolute and can be denied or restricted for the reasons expressly established in the laws, as is the case with the limits of articles 23 and 24 of the LTC regarding personal data.

III

At the outset, before the analysis of the substantive issue, it is appropriate to address certain issues that affect the information that is the subject of the claim.

In the application for access presented to the City Council, the claimant requested the "*[...] copy of the tests carried out in the selective processes to access the positions of ALL the staff currently working in this city council according to the personnel template that was sent to me with a certificate, as well as the bases of each selective process, the appropriate publications in the official newspapers and the contracts of each one.*"

However, in the claim presented to the GAIP, the person making the claim only refers to the *"selective processes tests staff City Council [...]"*.

In other words, in the claim submitted to the GAIP, the claimant does not expressly refer to the basis of the calls, publications made in the official newspapers, nor to the City Council staff contracts.

Although it may seem that the claimant dispenses with the information relating to the basis of the call, any publication in the official newspapers (it is understood that it refers to those related to the selective processes), and the contracts of the staff of the City Council, based on the elements that are available, it is not clear that this was their will.

It should be borne in mind that the person making the claim, in the claim form submitted to the GAIP, does not answer the question regarding whether he has received a response from the administration to which he has addressed the access request, but answers in the negative to the question of whether the administration has given him the information.

In the face of doubt, the object of analysis in this report will cover all the information to which the person claiming requested access before the City Council, that is to say, the *"[...] copy of the tests carried out in the selective processes to access the positions of ALL the staff currently working in this town hall according to the staff template that was sent to me with a certificate, as well as the bases of each selective process, the appropriate publications in the official newspapers and the contracts of each one."*

On the other hand, it is also necessary to refer to the fact that the person making the claim is requesting information regarding all the staff that make up the City Council's workforce. Therefore, the analysis that will be carried out in this report will cover both civil and labor staff of the City Council.

IV

Once it has been established what the object of the claim is, it is appropriate to place the limits established in the LTC relating to the protection of personal data, that is to say, the provisions of article 23 and 24 of the LTC.

Article 23 of the LTC provides 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".

In the event that the intended access does not affect particularly protected personal data referred to in article 23 of the LTC, it is necessary to comply with the provisions of article 24 of the LTC, which provides for the Next:

"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 the previous reasoned weighting of the public interest in the disclosure and the rights of the people affected. 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.

3. Requests for access to public information that refer only to the applicant's personal data must be resolved in accordance with the regulation of the right of access established by the data protection legislation staff".

Considering that the access request affects different types of public information, the analysis will be carried out individually for each of them.

v

Regarding the requested information that strictly affects the selective processes (*"[...] the tests carried out in the selective processes to access the positions of ALL staff [...], as well as the bases of each selective process , the appropriate publications in the official newspapers [...]"*) , the analysis must be based on the provisions of Royal Legislative Decree 5/2015, of October 30, which approves the revised text of the Law of the Basic Statute of the public employee (hereafter, EBEP).

The EBEP establishes that personnel selection processes in the field of public administrations are subject to a series of principles, among which it is worth highlighting those of publicity and transparency (article 55.2.a) ib)). And, with regard to the provision of jobs, it states that they must be provided through procedures based, among others, on the principle of publicity (article 78 EBEP).

Article 10.1.b) of Law 29/2010, of August 3, on the use of electronic media in the public sector of Catalonia, establishes that information must be disseminated by electronic media on access and staff selection.

At the local level, article 286 of Legislative Decree 2/2003, of April 28, which approves the revised Text of the Municipal and Local Government Law of Catalonia (TRLMRLC) provides in terms similar to the 'EBEP that access to the status of career official or labor personnel of local corporations must be done in accordance with the public offer of employment, through a

public call and compliance must be guaranteed of the constitutional principles of equality, merit and capacity, as well as the announcement of calls must be published in the BOP and the DOGC.

For its part, Decree 214/1990, of 30 July, which approves the Regulation of personnel in the service of local entities (RPEL), regulates the different access procedures for personnel of local administrations and, for this purpose, it contains provisions relating to the publication of notices of calls, the bases, etc. Such as article 76, relating to civil servants, in which it is foreseen the need to publish the call to the DOGC and the BOP together with the bases, or article 90, in the case of labor personnel, which also provides the need to publish it in the DOGC and the BOP, together with the bases.

With regard to the basis of the calls, article 70 of Decree 214/1990 provides that they must contain:

- " a) Number, nature and characteristics of the places subject to call, and express determination of the scale, subscale and class to which they belong; indication of the degree group to which each one corresponds and determination of those reserved for internal promotion, if applicable.*
- b) Selective system.*
- c) Aptitude or knowledge tests that must be passed, and determination of their number and nature.*
- d) The conditions and requirements established in the following article.*
- e) Center or department to which the requests must be addressed and submission deadline.*
- f) Selective tests that must be carried out and, where appropriate, list of merits that must be taken into account in the competition phase, as well as the accreditation and assessment systems for these merits.*
- g) Designation of the qualifying court that must act and its category. With regard to the selective training courses, the selective body must be made up of staff appointed by the School of Public Administration of Catalonia, in the terms provided for in the agreement mentioned in article 64.1 of this Regulation.*
- h) Qualification system and minimum score for each test.*
- i) Program on which the tests will be held.*
- j) Test start period, even if it is in approximate terms, or setting the maximum period of time that must elapse until the tests are carried out.*
- k) Action order of the applicants according to the result of the draw previously carried out, if applicable.*
- l) Express declaration that the courts cannot approve or declare that a greater number of applicants have passed the selective tests than the number of places subject to the call.*
- m) Designation of the multiprofessional team for the purposes of article 77 of these Regulations ."*

The Decree also provides for different provisions relating to the publication of the administrative acts carried out during the procedures, such as the list of admitted and excluded (art. 78); the list of those approved by score order (art. 80); the appointments of civil servants, to the BOP (art. 82 and 84), etc., or, with regard to the provision of jobs, the need to publish the score and proposed resolution of the applicants' merit competition (art. 118.3).

From the point of view of the transparency regulations, reference must be made to article 9.1.e) of the LTC, which provides that the Administration must make public the call and the result of the selective processes for the provision and promotion of the staff

In relation to this information, article 21 of Decree 8/2021, of February 9, on the transparency and the right of access to public information (from now on, RLTC), which develops article 9.1.e) of the LTC, foresees that the calls for proposals and the results of:

"[...]

a) Access procedures to the bodies and scales of statutory civil servants and labor personnel.

b) Internal promotion procedures.

c) Provisional and definitive provision procedures. d) Procedures for the selection of temporary staff or temporary workers, including temporary staff exchanges. e) Scholarships and grants for providing services. f) Intern recruitment offers.

2. 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 names and the four numbers of the national identity document or equivalent document of the persons admitted in 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. [...]"

To this end, it should be borne in mind that the seventh additional provision (DA7) of the LOPDGDD establishes the following:

"1. When it is necessary to publish an administrative act that contains personal data of the person affected, it will be identified by means of his name and surname, adding four random numerical digits from the national identity document, foreigner's identity number, passport or equivalent document. When the publication refers to a plurality of those affected, these random figures must be alternated.

When it comes to notification through announcements, particularly in the cases referred to in article 44 of Law 39/2015, of October 1, of the Common Administrative Procedure of Public Administrations, the affected person will be identified exclusively through the full number of your national identity document, foreign identity number, passport or equivalent document.

When the affected person lacks any of the documents mentioned in the two previous paragraphs, the affected person will be identified solely by means of their number and last name. In no case should the number and surname be published together with the full number of the national identity document, foreign identity number, passport or equivalent document.

2. In order to prevent risks for victims of gender-based violence, the Government will encourage the development of a collaboration protocol that defines safe procedures for the publication and notification of administrative acts, with the participation of the bodies with competence in the matter."

Based on everything that has been explained, it follows that both the transparency regulations and the local regime regulations provide for different advertising obligations in relation to staff selection processes. To the extent that the same regulation foresees the need to publish certain information that affects personal data related to the various

administrative acts of the processes, in principle it does not seem that the personal data protection regulation can prevent access to this information.

In particular, with respect to the information to which access is requested, the data protection regulations would not prevent access to the information relating to the bases of each selective process and the administrative acts which the regulations we have just mentioned analyze provides that they must be published in the respective official newspapers.

VI

A different question is the one related to the possibility of access to a copy of the tests carried out in the selective processes.

At the outset, it should be noted that it is understood that the person making the claim is interested in the copy of the tests taken by all applicants in the selective processes, and not mere access to the statements of the tests.

From the perspective of data protection regulations, it must be said that there would be no disadvantage in providing the claimant with the test statements (test content) and even the answer template or criteria used by to the evaluation of the test, given that no personal data would be affected.

Different is the access to the individualized copy of each of the tests carried out by the applicants in the selective processes.

Based on the information available, it cannot be ruled out that among the requested information there may be specially protected personal data referred to in article 23 of the LTC (*[...] relating to the ideology , trade union membership, 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 [. ..]*), especially if psychotechnical tests were carried out, in which various aspects of the aspirants' personality are assessed that can lead to the preparation of a psychological profile on these people.

To the extent that they contain specially protected data referred to in article 23 of the LTC, access to this information must be denied unless the consent of the affected persons is available , or some other the enabling circumstances provided for in article 15.1 of the LT.

And, with respect to the tests in which specially protected data are not affected to which we have just referred, the analysis of the possibility of access must be carried out in accordance with article 24.2 of the LTC, that is to say, through the weighting between the public interest of the requested information and the right to data protection of the affected persons, all this taking into consideration the circumstances that may occur in the case being analyzed (such as the elapsed time, the purpose of the access, the fact that it may affect the safety of people...).

The purpose of the access request is one of the elements that can be taken into account to carry out the weighting. It should be borne in mind that although article 18.2 of the LTC provides that the exercise of the right of access is not conditional on the concurrence of a personal interest, and is not subject to motivation nor does it require the invocation of any

rule, knowing the motivation for which the person making the claim wishes to obtain the information can be a relevant element to take into account in the weighting.

According to the information contained in the file, the person making the claim has not stated the purpose for which they are requesting access. Nor does it appear from the information sent the possibility that the person making the claim has requested access on the grounds of having participated in one of the selective processes, or is part of the council's employee representative bodies.

For this reason, the purpose of the access cannot be considered for the purpose of carrying out the weighting in the terms of article 24.2 of the LTC. However, in accordance with the provisions of article 18.2 of the LTC, this fact does not in itself prevent the exercise of the right of access to public information.

In any case, without prejudice to the fact that the person making the claim has not stated the reasons for which they are requesting access, the purpose pursued by the transparency regulations is *"to establish a system of relations between people and the public administration and the 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 management public"* (article 1.2 LTC), or in other terms, establishing the possibility of offering tools to citizens for the control of the performance of public authorities.

Transferred to the case at hand, and from the perspective of the person making the claim, it may be relevant to access the tests carried out and to be able to know the score obtained by each participant in each phase of the selection process, as well as the final score.

In this sense, in accordance with what has been analyzed in the previous legal basis, the regulations analyzed, with respect to certain information that affects the selection processes, prevails over the public interest in access to the identity of the people who participate in the selective processes of the public administrations and the result of the process, with regard to the people who pass it, against the right to privacy of these participants.

However, there is other information on which the regulations do not require that publicity be given, as is the case with the tests carried out by each applicant.

C bearing in mind that facilitating access to a copy of the evidence would be a rather invasive measure of the privacy of the people affected, which could affect both the unfolding of their lives in the personal sphere and in the sphere social or professional.

At the same time, it cannot be ruled out that the intended access may affect a large number of people.

Although knowing this information (content of the tests carried out) could be relevant to achieve the purpose that a participating person who has not been selected could seek, this relevance does not seem to be the case in the case of the claimant, so that the access could pose a serious threat to the private sphere of the people affected, resulting from the communication of their data without a purpose that justifies it. At least, access does not seem sufficiently justified for a general purpose of transparency.

For these reasons, in view of the information provided, and given that it does not appear that the claimant has participated in the selection process, nor does he specify other reasons that may be relevant for the purposes of weighting (art. 24.2 of the LTC) , from the perspective of data protection regulations, it does not seem sufficiently justified to give him access and a copy of the tests carried out in the selective processes to which he refers in his request for access.

VII

The claimant also requests access to the contracts of all the staff currently working at the City Council.

In accordance with what has been indicated previously, it seems that the person making the claim refers to this information regarding the labor staff, insofar as it refers to the contracts of the staff who work at the City Council.

A priori, it may seem that it actually refers to the labor staff, since taking into consideration the information relating to the staff of the City Council, to which he claims to have accessed previously in his request for access, there there are three positions for labor personnel (one for administrative personnel and two for workers in the works brigade) and only one for official personnel (secretary-controller).

As for civil servants, obviously their contract cannot be accessed, because their relationship is not of a contractual type, but rather a statutory relationship based on the existence of an appointment. In any case, the data protection regulations, if there are no circumstances from which the data protection of the affected person must prevail, would not prevent access to the appointment of civil servants, insofar as in accordance with article 82 and 84 of Decree 214/1990, the appointment of civil servants must be published in the BOP. In other words, it is information which, by virtue of the principle of publicity that must govern selective processes, must be published in the corresponding BOP.

Regarding the possibility of accessing a copy of the employment contracts of the City Council's labor staff, it should be borne in mind that these documents may include, in general, the identification data of the working person and information on the type of contract , the professional category, description of functions, duration or place where the task must be performed (data relating to employment), the data corresponding to the total gross remuneration distributed, where appropriate, in different remuneration concepts (remuneration data) , without ruling out any specific clauses that may exist in some cases, in relation to workers in a situation of social exclusion, victims of gender violence, or others who deserve special protection.

For this reason, it cannot be ruled out that the employment contracts to which access is requested may contain information relating to categories of specially protected data referred to in Article 23 of the LTC, such as data relating to a disability (health) or other data that may appear in specific clauses.

Thus, to the extent that they contain specially protected data, access to must be denied unless one of the cases referred to in article 23 of the LTC or article 15 of the LT occurs.

On the other hand, it is clear that the information contained in employment contracts exceeds merely identifying data, even if they may be relatively related to the organization of the City Council. For this reason, it is not appropriate to apply what is provided for in article 24.1 of the LTC.

Consequently, analysis of the possibility of access must be carried out in accordance with what is provided for in article 24.2 of the LTC, that is, based on the weighting between the public interest of the information and the rights of the affected people.

It should be borne in mind that, in accordance with what has been analyzed in the previous legal basis, the person claiming does not state the purpose for which he requests the information, and it is not clear from the information contained in the file sent.

With respect to the circumstances in the particular case, it is necessary to refer to the fact that the workforce is made up of a secretary-controller (official staff), one place corresponding to administrative staff and two places for laborers of the works brigade (labour staff temporary and part-time).

Therefore, the number of people affected by the access request is very small – three people.

Regardless of the number of people affected, from the perspective of the general purpose of transparency, access to a copy of the City Council's staff contracts can serve the claimant to monitor the corporation's actions, such as , if what is contained in the general clauses of the employment contract correspond with the information that was published in the basis of the call, or, in a broader sense, it can allow the cost of the City's human resources to be assessed.

However, it is clear that facilitating access to this information implies an interference in the privacy of the affected workers that may affect their personal and professional sphere, especially if specific clauses have been included due to the concurrence of personal circumstances that have motivated

At this point, it is necessary to refer to the provision of article 5.1.c) of the RGPD, relating to the principle of data minimization, which provides that personal data must be adequate, relevant and limited to what is necessary in relation to the purpose for which they will be treated .

For this reason, and taking into account that knowledge of the relevant information can be obtained both from the characteristics of the job contained in the call, and from the information included in the City Council's list of jobs, it does not seem obtaining a copy of the employment contract is justified, given that it would constitute an unjustified interference in the right to the protection of the personal data of the affected persons.

conclusion

The data protection regulations do not prevent access to the information relating to the call and the bases of the selective processes carried out by the City Council, the rest of the acts of the processes subject to publication and, in particular, to the results of the called processes.

Now, taking into consideration the circumstances that come together in the particular case, from the point of view of the general purpose of transparency, access to the tests carried out by the candidates in each of the selective processes, nor to the contracts of formalized work

Barcelona, November 2, 2022

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