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Autoritat Catalana de Protecció de Dades

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 against the refusal of a municipal company to request access to certain reports

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 refusal by a municipal company of the sole· request for access to Compliance reports Officer and to the external advisor's reports.

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. According to the documentation sent, the GAIP resolved a claim for access to public information made by a person, a journalist, against a group of municipal companies in which access to all the reports issued was requested by the Ethics, Criminal Risk Prevention and Regulatory Compliance Committee (CEPRAN) to a City Council, as well as to other municipal companies, foundations or boards of trustees.

According to the information contained in the file sent, and in particular in the aforementioned resolution, among the companies affected by the access request was the municipal company (henceforth, the entity) . However, the GAIP did not analyze the access to the reports issued by CEPRAN regarding this entity, having argued the grouping of municipal companies that it does not belong to the grouping.

2. Subsequently, it also appears from the file sent that the GAIP resolved another claim for access to public information made by the same person in which he requested from the entity access to the reports issued or contained of CEPRAN.

In this file, the entity denied that it had any CEPRAN report, since unlike the rest of the municipal companies, it opted for the figure of compliance officer _ In accordance with what is contained in the aforementioned resolution, the entity explained that, in any case, *"the CEPRAN reports (Compliance Officer) are working documents necessary for the maintenance and updating of the so-called "crime prevention model", but which are not legally required. Equally, it must be taken into account that these documents have a legal - criminal basis provided by external experts, lawyers in practice, which is affected by what is called professional secrecy [...]."*

The resolution of the GAIP dismisses the claim on the understanding that to the extent that the entity does not have a CEPRAN, it is unnecessary to assess the access limits *"[...] with respect to the reports issued by the officer or responsible for criminal and ethical regulatory compliance (compliance officer), given that they were not the subject of the request for information and cannot be the subject of the claim".*

In this resolution, the GAIP also warns:

"Nevertheless, the parties should take into account, in the face of a new request for access to the reports issued by the compliance officer [...], the criterion of this Commission widely justified and founded in its Resolution 285/2022, of April 7, on the impropriety of completely dismissing access to these reports in application of a professional secret that, in any case, the regulations impose on the issuing lawyer, and not on the public company client and recipient of the report, which is the one to which the request for public information is addressed, and the origin of restricting access only in relation to data that allows a direct or indirect identification of the person reporting violations of the Code of Ethics, reports that are part of open disciplinary procedures, data of specially protected natural persons that may be included to the requested reports, without prejudice to the fact that in the reports of the officer responsible for the criminal regulatory compliance of [...] there may be other limits that need to be assessed."

3. On August 25, 2022, the same person submits a new request to the City Council in which he requests access to the "[...] *Compliance reports officer* (of the entity) *from 2015 to the present. I also request the reports made by the company [...] in the same period of time".*

As can be seen from the file sent, the entity has signed a service contract with an external company as an official or responsible for compliance with criminal and ethical regulations (compliance officer).

4. On October 5, 2022, the entity responds to the access request in the following terms:

"First of all, [...] that the Compliance figure Officer [...] was not created until 2018.

Secondly, since its creation, the figure of Compliance Officer has not written any report. These documents have been configured by the (external) company.
They are files that [...] are necessary for the maintenance and updating of the so-called "crime prevention model", which have a legal - criminal basis contributed by external experts, lawyers in practice, affected by what is called professional secrecy .

In the third and last place [...] professional secrecy is imposed on the lawyer in practice, in these cases the (external) company, who are the personal editors, issuers and signatories of the reports. Therefore, it would be about documentation that could not be delivered."

5. On the same date, October 5, 2022, the applicant submits a claim to the GAIP in which he claims access to the compliance reports officer of the entity and of the external company.

6. On October 14, 2022, the GAIP sends the claim to the entity, and asks 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, if where applicable, specifying the third parties affected by the claimed access.

7. On October 24, 2022, the entity sends the GAIP a report with a copy of the complete file relating to the claim that has been submitted.

In the report sent, the entity reiterates the arguments for which it denied access to the person making the claim and adds the following:

"[...] the existence of ongoing legal proceedings in which (the entity) *is a party also make it impossible to hand over the reports drawn up by the* (external) company *, given that if the information contained in both* (the 'entity) *as third parties who participate in judicial proceedings may suffer a violation of their fundamental rights recognized in the Spanish Constitution, such as the right to honor, recognized in article 18.1, and the right to defense , described in article 24.2.*
Therefore, it is essential for (the entity) *to keep this information confidential in order to guarantee the correct functioning of the legal proceedings in which it finds itself immersed and, consequently, not to risk its defense strategy, which would be wasted if any of the data collected in the documents configured by the* (external) company *is disseminated or reused by the interested party."*

8. On October 27, 2022, the GAIP sends the report issued by the entity to the person making the claim.

9. On the same date, October 27, 2022, the claimant sent an email to the GAIP in which he disagreed with the entity's arguments in its report.

In summary, the person making the claim refers to the resolutions previously issued by the GAIP which have been referred to in the first two antecedents of this report to defend that the entity must provide the reports it claims.

The person making the claim is also dissatisfied with the entity's argument regarding the fact that it cannot provide access to the claimed reports because there are legal processes whose defense could be prejudiced. The person making the claim asks if all the reports that the entity has are related to pending legal proceedings and, ultimately, states that " *what happens in the trial is none of this journalist's business. What is requested are the reports that were made at the time and those that were made for other reasons* ."

10. On November 8, 2022, the GAIP requests additional information from the entity. In particular, it requests the reports made by compliance officer and those of the external company with the objective *"[...] to be able to resolve with full knowledge of the cause, and thus assess the legal limits invoked".*

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

11. On November 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 government

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 contained in the requested information is outside the scope of this report, in particular, according to the allegations made by the parties, the limits provided for in articles 21.1.d) and 21.1.g).

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 that concerns us in which access is requested to the reports drawn up by compliance officer of a public company, and those issued by the external company that advises on criminal and ethical regulatory compliance, this information must be considered public for the purposes of article 2.b) of the LTC and subject to the right of access (article 18 of the LTC), as it is documentation in his possession as a result of his activity. It should be noted, however, that this right of access is not absolute and may be denied or restricted for the reasons expressly established in the laws.

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

The object of the claim is the reports drawn up by compliance officer of the entity and those carried out by the external company within the framework of the contract for external advisory services in the field of criminal compliance and ethics (henceforth, the reports).

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

Regarding the content of the reports to which the person making the claim is requesting access, first of all, it is noted that there is no clear information available in relation to what the exact content of the reports is, beyond that they seem to be related to advice on criminal regulatory compliance and on ethics, whether on the part of compliance officer or come from the external company.

Now, as can be seen from the content of the file sent, it seems that among the reports affected by the access request there are those related to ongoing legal proceedings in which the entity is a party.

It also cannot be ruled out that there are other reports relating to completed court proceedings and, probably, reports unrelated to any specific court proceedings.

Knowing which categories of personal data are affected is relevant when analyzing the applicability of data protection limits in the specific case, in accordance with what will be analyzed in the following legal basis.

Secondly, reference must be made to the fact that the entity states that it does not have reports made directly by compliance officer , and that the origin of those it possesses come from the external company.

From the perspective of data protection regulations, in accordance with what will be analyzed below, the fact that the reports come from compliance itself officer of the entity or of the external company, in the framework of the provision of service as an external advisor, does not vary the limits applicable to the right of access exercised by the person making the claim.

IV

Once the previous issues that must be taken into account in the analysis of the possibility of accessing the reports have been located, it is necessary to analyze to what extent the right of access to public information exercised by the person making the claim can be limited from from the perspective of articles 23 and 24 of the LTC, relating to the protection of personal data.

In accordance with what has been advanced in the previous legal basis, in general the exact content of the reports is unknown, without prejudice to the fact that it can be deduced that there are reports relating to legal proceedings in progress where the entity is a party, as well as others that refer to closed judicial proceedings, reports related to internal investigations derived from conduct or acts that are presumably infringing, among others.

Depending on the content of the reports, different categories of personal data will be affected, and this will condition the analysis of the particular case. Proof of this is that the

GAIP has demanded from the entity the submission of the reports affected by the access request in order to be able to assess to what extent the limits of the transparency regulations apply to the right of access exercised by the person claiming.

In any case, it should be borne in mind that on the basis of what is provided for in articles 2.1 and 4.1 of the RGPD, in relation to what is established in recital 14, there must be no inconvenience from the perspective of the regulations of data protection when providing the person making the claim with the information referred to the entity, because the data protection regulations do not apply to legal entities. In the same way, there should also be no inconvenience in facilitating access to reports where there is no affectation of personal data, such as, where appropriate, reports drawn up with the aim of creating, modifying or adapting a Criminal Risk Prevention Plan or related to other internal protocols related to the prevention of crimes in the company or in matters of business or professional ethics, given that, in principle, these reports should not include personal data.

Outside of these cases, that is to say, with respect to those reports where issues affecting natural persons are analyzed or reported, whether as a result of a complaint through the internal complaints system or channel, or any other reason that justifies the preparation of the report and that affects natural persons, including testimonies, it is necessary to analyze the application of the limits derived from the protection of personal data.

At the outset, it is clear that it cannot be ruled out that the limit of Article 23 of the LTC may apply in cases where the reports contain particularly protected personal data, such as, and in particular, the reports that are related to the commission of criminal or administrative offenses that do not entail a public reprimand to the offender.

In particular, article 23 of the LTC provides for 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".

On the basis of this provision, with respect to those reports containing specially protected data (including data on health, union membership, and, in accordance with what we have advanced, information related to the commission of administrative or criminal offences, etc.), access to this information must be limited unless the consent of the affected persons is available or, where applicable, in application of the provisions of article 15 of the LT, the affected person has publicly stated the data prior to the access request, or the access is protected by a law.

This limit, provided for in article 23 of the LTC, will of course apply especially in those reports that refer to the natural person to whom the commission of an offense has been or is attributed of a criminal or administrative nature when it does not entail a public reprimand for the offender, and unless the exceptions we have referred to apply. However, it should also be borne in mind that it may also apply when the reports refer to other natural persons and, in particular, to their health data or any other data related to the categories referred to in article 23 of the LTC.

In the case of data relating to criminal or administrative offences, the possibility of accessing this information must be excluded. And in this case it seems that it would not be enough to anonymize the information by removing the identifying data , given that the context in which the request for information occurs can make the person or persons affected easily identifiable. And this same conclusion should also be applied to health data, as it is not enough to exclude only the specific health condition suffered. It must be remembered that the absence of health, or the fact of having suffered from a health condition is already in itself a personal data relating to health. Therefore, to the extent that this information can be associated with a natural person, it must also be excluded from access.

IV

Regarding reports that do not contain specially protected data referred to in article 23 of the LTC, the analysis on the possibility of accessing its content by the person making the claim must be carried out through of the mechanisms provided for in article 24 of the LTC.

In this regard, article 24 of the LTC provides for the following:

"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.
[...]"

At the outset, in accordance with what is provided for in article 24.1 of the LTC, in principle there should be no impediment in giving the person claiming access to the merely identifying information that corresponds to the person exercising of compliance officer in the entity that may appear in the requested documentation.

To this end, it is necessary to take into account the provisions of article 70.2 of Decree 8/2021, of February 9, on transparency and the right of access to public information (from now on, RLTC), by which it is necessary to understand as merely identifying data those 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, referred to the staff at the service of the public administrations, senior officials and managerial staff of the public sector of public administrations.

On the other hand, with respect to the identification data of those who sign on behalf of the external company in the reports drawn up in the framework of the provision of services related to external advice on regulatory compliance, it cannot be considered that their identifying data must require specific protection or confidentiality, especially if it is taken into account that, as it appears from the file sent, they are legal professionals. At the outset, your identification data (name and surname and membership number) and profession, is information that the corresponding professional associations must already make public. But beyond that, the level of intrusion that access to this data entails would not be substantially different from the case of the data that has just been exposed regarding compliance officer in such a way that it may fall within their privacy expectations that it may end up knowing their authorship or participation in the preparation of the report.

Regarding the rest of the categories of affected persons, such as whistleblowers or witnesses, who may appear in the reports on which access is requested, the 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, 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 account the circumstances that may occur in the case being analyzed (such as the time that has passed, the purpose of the access, the fact that it may affect the safety of people...).

With respect to the possibility of access to information relating to whistleblowers, first of all, it is necessary to comply with the provisions of article 24 of the LOPDGDD, relating to the internal whistleblowing information system. In this sense, article 24 of the LOPDGDD provides for the following regarding these treatments:

" [...] 2. Access to the data contained in these systems will be limited exclusively to those, whether or not affiliated with the entity, who carry out the functions of internal control and compliance, or to those in charge of the treatment that are eventually designated to that effect. However, its access by other persons, or even its communication to third parties, will be permitted when it is necessary for the adoption of disciplinary measures or for the processing of the judicial proceedings that, in their case, proceed.

Without prejudice to the notification to the competent authority of facts constituting a criminal or administrative offense, only when disciplinary measures could be taken against an employee, such access will be granted to personnel with functions of management and control of human resources.

3. The necessary measures must be taken to preserve the identity and guarantee the confidentiality of the data corresponding to the persons affected by the information provided, especially that of the person who had brought the facts to the knowledge of the entity, in case it had been identified
[...]
5. The principles of the previous sections will be applicable to the internal reporting systems that could be created in the Public Administrations ."

On the basis of this article, access to the information contained in the internal complaints system is limited to those who carry out internal control and compliance functions (in our

case, if applicable, the compliance officer of the entity), or to those in charge of the treatment that may eventually be designated (such as the external company), except in cases where the adoption of disciplinary measures or the processing of judicial procedures is necessary, in which it will be lawful communication to other people or, even, communication to third parties. In the event that this information is necessary to adopt disciplinary measures against a worker or public employee, access is also allowed to personnel with human resources management and control functions.

In the case at hand, taking into account that the purpose of the access is one of the elements that can be taken into account to carry out the weighting, and without prejudice to the fact that in accordance with article 18.2 of the LTC the right of access is not conditioned on the concurrence of a personal interest, and does not remain subject to motivation nor does it require the invocation of any rule, the person claiming does not expressly state what the objective of his request is.

However, it seems that the claimant's interest is journalistic, given that in the email he sent to the GAIP on October 27, 2022, he refers to the fact that *"Whatever happens in the trial is not of this journalist".*

In any case, it is clear that we are not faced with any of the cases provided for in article 24 of the LOPDGDD to be able to communicate information relating to internal complaints to the person making the claim, nor does it seem necessary to know the data of the reporting person to be able to audit and control the performance of the entity by the person making the claim.

For this purpose, reference must also be made to the principle of data minimization provided for in article 5.1. c) of the RGPD), from which the personal data provided must be adequate, relevant and limited to what is necessary for the intended purpose, and from which access to the information must be prevented regarding the reporting persons.

Thus, it will be necessary to preserve the privacy of whistleblowers by anonymizing them .

It should be noted that, in accordance with the provisions of article 70.6.a) of the RLTC, anonymization is understood *"the elimination of the personal data of the natural persons affected contained in the information and any other information that may allow them to be identified directly or indirectly without disproportionate efforts, without prejudice to being able to maintain, where appropriate, the merely identifying data of the charges or staff at the service of the public administrations that dictate or intervene in the administrative act."*

Regarding the rest of the data of people who may be affected by the access request, especially those relating to witnesses, as this Authority has argued in other reports (IAI 35/2019, 14/2020, IAI 32/ 2022), access by the person making the claim to their identity could have harmful effects for these people in terms of labor relations, given that the disclosure of what they may or may not have said in the course of the investigation could end up negatively affecting the working relationships of these people. For this reason, it is necessary to preserve the identity of these people by anonymizing them .

v

Finally, reference must be made to article 25.1 of the LTC, from which *"If any of the access limits to public information established by the previous articles are applicable, the denial of access only affects the corresponding part of the documentation, and restricted access to the rest of the data must be authorized".*

Now, taking into consideration that in the case at hand, it may be that the anonymization referred to in article 70.6.a) of the LRTLC is not effective, since the identity of the persons who may be responsible for the facts investigated, or even from other people, such as witnesses, can be known from the previous information available to the person making the claim, without disproportionate efforts.

In this case, it is considered that knowing the information that may be contained in the reports may be of public interest to the extent that it may allow to supervise and control the performance of the entity with respect to the advice received by the compliance department itself officer or of the external company that provides advisory services in matters of regulatory compliance, to verify whether the entity's actions are diligent in this matter.

For this reason, it is considered that in cases where anonymity cannot be guaranteed under the terms of article 70.6 of the LLRTC, it would be justified to provide at least certain information contained in the reports. This information could be provided by analogously applying the solution provided for in article 68.4 of the LTC, that is, *"[...] In the event that the content of the report may reveal information affected by the limit, the need to publication of the report is understood to be satisfied by the publication of an extract or summary of the content in such a way as not to reveal the information affected by the limit".*

Thus, for these reasons, in the event that anonymization is not possible in accordance with what has been set forth, the person making the claim should be provided with a summary of the reports that does not contain the affected data which, on its own or in connection with other information that can be accessed, the claimant may end up relating to identified or identifiable persons.

Conclusion or

Data protection regulations do not prevent the claimant from accessing information relating to legal entities or reports that do not contain personal information. Nor does it prevent access to merely identifying compliance information officer and the external lawyers who wrote the reports.

However, with respect to the information relating to the persons allegedly responsible, the reporting person and, where appropriate, witnesses, must be provided anonymously. And to the extent that effective anonymization is not possible , access must be facilitated through a summary of the actions taken, so that the physical persons affected are not identifiable.

Barcelona, November 24, 2022