

## **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 partial denial of a city council's request for access to the selection file for two technician positions of general administration**

The Commission for the Guarantee of the Right of Access to Public Information (GAIP) asks the Catalan Data Protection Authority (APDCAT) to issue a report on the claim submitted in relation to the partial denial of a council of the sun · request for access to the file for the selection of two general administration technician positions under the career civil servant regime .

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

### **Background**

1. On May 8, 2022, a citizen requests the city council to access the file for the selection of two positions of general administration technician under career civil servant regime and to obtain a copy, if she considered it necessary, of any of the documents in that file. The applicant had participated in the selection process, the tests of which, according to her, took place on March 25, 2019.

2. On July 31, 2022, the same person, in view of the response given by the City Council that has given him access to the file, expands his request and requests:

*"(...)obtain a copy of the emails that were sent/received between the staff attached to the human resources service at that time, between the members who were part of the selection board and the staff attached to the secretariat related to the selection procedure from its beginning (with the file approval agreement) and until its completion."*

3. On September 20, 2022, the applicant submits a claim to the GAIP against the city council for the denial of access to the required documentation related to the personnel selection file. In the claim, it states that you want access to:

*"(...)Once the file has been examined, it does not include the call to the members of the selection board, nor the scores awarded by each member of the board, nor the average grade obtained by each of the applicants for this to determine the completion of the internship period; there is a whole series of documents and procedures that have been carried out via email and these emails are part of the administrative file even though they were not incorporated into the electronic file. Request/claim: to be able to enforce the right of access and, as a mediation measure, I propose that this task be carried out by an IT expert I trust/proposed by me, paying the costs that this may incur behave, if deemed necessary."*

4 . On October 4, 2022, the GAIP sends the claim to the town hall and informs it that it will be processed, at the express request of the claimant, through the mediation procedure and requests the designation of the person or persons who will represent to the town hall in that procedure. It also requires the issuance of a report on which to base its positions, as well as the complete file relating to the request for access to public information and the identification of the third parties affected by the access claimed

5. On October 11, 2022, the City Council sends the GAIP the designation of the person representing the City Council in the mediation procedure.

6. On October 11, 2022, the claimant submits a letter to the GAIP in which he specifies that he wants to access the following documentation:

**" 1. E-mails sent by the members of the tribunal to choose which two practical cases the applicants will have to develop , since according to the selection criteria these had to be chosen jointly by the members of the tribunal and on the day of the exam were already written and printed.**

**2. E-mail or other document in which the score given by each member of the tribunal regarding the two theoretical exercises of each of the applicants is included.**

*According to the bases, Qualification of the tests (base 8<sup>a</sup>): the score for each of the exercises must be evaluated by each of the members of the panel and the final mark will be the arithmetic mean of the points awarded by each member of the panel and, with respect the correction of the theoretical exercise (as opposed to the practical one where the grade given by each member of the court has been included in the file) only a few comments have been noted regarding the level of the explanation and it is left to finish it another day. Since it is not recorded that they met again, the scores were probably awarded via email and the middle was done without including the email in the file.*

**3. The minutes of each session in which the court meets have not been included in the file, so if they have not been recorded it is because the final scores were awarded by email .**

*The only record in the file is the evaluation report of the two applicants although, with respect to the second one, it is incomplete (it states that the court met on January 17, 2020 at 8:30 a.m. but the file lacks documentation (call, evaluation...))*

**4. Regarding the internship period , I have not been given:**

**4.1) the internship program agreed by the court and communicate to the head of the service where these internships will take place.**

**4.2) Note that in accordance with the rules, the tutor of the second applicant with the best qualification is awarded with respect to passing the internship period.**

*I have been provided with a report from the tutor on the completion of the internship, but this does not relate to the fact that I obtained a score higher than 5 or according to which program it was evaluated.*

**4.3) The call to the members of the panel to evaluate the practices of the second of the applicants** , since in accordance with the selection bases "(...)Once the internship period has ended, the selection panel will evaluate the selected applicant on the internships carried out, previous report from the head of service on the candidate's suitability to fill the position (minimum score of 5). In the event that one of the applicants does not pass the internship period, the next applicant will be appointed in order of score, provided that he/she has passed all the tests. The internship period is part of the selection process (...)

**4.4) the grade that each of them awarded, in accordance with the rules."**

7. On October 27, 2022, the city council sends the GAIP the requested report, as well as the list of interested third parties. The report is based on the considerations that the e-mails are not part of the claimed administrative file and that access to the e-mails could constitute a violation of articles 6.1 and 9 of the LOPDGDD. These considerations are included in the report in the following terms:

*(...)From all that has been explained so far, it is proven that, on the one hand, the mails electronic files are not part of the administrative file nor, on the other hand, are there has no obligation to keep them or give access to these communications.*

*But in addition, it should be borne in mind that the request for access is very broad, it affects a*

*people who may have participated in the selection process and who currently are not in active service at the City Council, with their email accounts no operational, and that it is not known if they had communications made by mail electronic relating to the selective process and in what frequency, content or amount In addition, the request involves accessing third-party email accounts people, some with the status of public employees of the City Council and others that do not have this condition, which would not be possible without the necessary one information and authorization of these people, and access to email accounts outside the City Council.*

*5.- Finally, and considering the request for access from a point of view of the content of the e-mail and its treatment from one point of view of a personal nature, it should be borne in mind that access could be a violation of articles 6.1 (treating data without the owner's consent) and 9 (no guarantee the security of files) of Organic Law 3/2018, of December 5, of personal data protection and guarantee of digital rights. the communications by e-mail, even if it is instead of mail of company, they are not alien to the rights to data protection (...)."*

8. On November 9, 2022, the claimant waives the mediation procedure.

9. On November 14, 2022, the GAIP requests this Authority to issue the report provided for in article 42.8 of Law 19/2014, of December 29, on transparency, access to public information and good government, in relation to the claim presented.

## Legal Foundations

### I

In accordance with article 1 of Law 32/2010, of October 1, of the Catalan Data Protection Authority, the APDCAT is the independent body whose purpose is to guarantee, in the field of the competences of the Generalitat, the rights to the protection of personal data and access to the information linked to it.

Article 42.8 of Law 19/2014, of December 29, on transparency, access to public information and good governance, which regulates the claim against resolutions on access to public information, establishes that if the refusal has been based on the protection of personal data, the Commission must request a report from the Catalan Data Protection Authority, which must be issued within fifteen days.

For this reason, this report is issued exclusively with regard to the assessment of the incidence that the requested access may have with respect to the personal information of the persons affected, understood as any information about an identified or identifiable natural person, directly or indirectly, in particular through an identifier, such as a name, an identification number, location data, an online identifier or one or more elements of physical, physiological, genetic, psychological, economic, cultural or social security of this person (art. 4.1 of Regulation 2016/679, of April 27, 2016, relating to the protection of natural persons with regard to the processing of personal data and the free circulation of such data and by which Directive 95/46/CE (General Data Protection Regulation, hereafter RGPD) is repealed.

Therefore, any other limit or aspect that does not affect the personal data included in the requested information is outside the scope of this report.

The deadline for issuing this report may lead to an extension of the deadline to resolve the claim, if so agreed by the GAIP and all parties are notified before the deadline to resolve ends.

Consequently, this report is issued based on the aforementioned provisions of Law 32/2010, of October 1, of the Catalan Data Protection Authority and Law 19/2014, of December 29, of transparency, access to public information and good governance.

In accordance with article 17.2 of Law 32/2010, this report will be published on the Authority's website once the interested parties have been notified, with the prior anonymization of personal data.

### II

The claim is lodged against the refusal by the city council of access to certain documentation of the file processed by that city council for the selection of two positions of general administration technician under the career civil servant regime.

Specifically, the claimant requests access to the emails sent between " *the personnel assigned to the human resources service at that time, between the members who were part*

*of the selection board and the personnel assigned to the secretariat related to the selection procedure " which contain the procedures specified in the claim and specified in the supplementary document presented to the GAIP (on October 11, 2022), transcribed in the background of this report. According to the claimant's statements, the procedures requested are not recorded in the administrative file to which she had access and that they were mandatory in accordance with the basis of the call, which is why she considers that they must be in the e-mails of those responsible for the processing of the file and the members of the evaluating court.*

Although it is not up to this Authority to pronounce on the information that should form part of the administrative file that is the subject of the claim, to the extent that the City Council justifies the denial of access by the fact that it cannot access the e-mails of those responsible for processing and members of the qualifying board, without violating the data protection regulations, specifically articles 6.1 (treating data without the owner's consent) and 9 (not guaranteeing the security of the files) of the Organic Law 3/2018, of December 5, on protection of personal data and guarantee of digital rights LOPGDD, it is considered appropriate to carry out the following preliminary considerations:

Firstly, in accordance with the management powers of the government and the municipal services that correspond to the mayor (Article 53.1.b) TRLMRLC), he can agree that the municipal workers responsible for processing the selection file of personnel incorporate the procedures that have been carried out using the municipal corporate mail and that are deposited in their mailboxes. This data processing would not have a different purpose from the initial processing and would be protected by the same legal basis (Article 6.1.e) RGPD.

Without prejudice to this, and taking into account that as indicated by the City Council, some workers no longer provide services to the City Council, it is necessary to take into account the provisions of article 87 of the LOPDGD:

*Article 87. Right to privacy and use of devices digital in the workplace .*

*1. Workers and employees public they will have right to the protection of your intimidation in the use of the devices digital put on \_ provision for su employer \_*

*2. The employer will be able access the contents derived from the use of media digital provided to workers for the sole purpose of monitoring compliance with obligations labor or statutory and to guarantee the integrity of said devices \_*

*3. The employers they must establish criteria for using the devices digital respecting the standards in any case minimum sun protection \_\_ intimacy according to social customs and rights recognized constitutionally and legally . In su elaboration the representatives of the workers must participate .*

*Access by the employer to the content of devices digital compared to the existing ones admitted its use for private purposes will require the authorized uses to be precisely specified and established guarantees to preserve the privacy of the workers , such as, in their case, the determination of the periods in which the devices they can be used for private purposes .*

*The workers they must be informed of the use criteria referred to in this section ."*

In this same sense , [Recommendation 1/2013](#) of this Authority on the use of e-mail in the workplace provides that employers , in this case the City Council, must establish criteria for the use of digital devices placed at the disposal of the workers for the development of their tasks, among themselves and mainly, the email. These criteria, which must be known by the workers, must specify the permitted uses, the guarantees to preserve the privacy of the workers, define the conditions under which, if applicable, this tool can be used for private purposes, as well as define, among others, security measures and information retention policies.

In this context, in cases like the one raised by the city council in its report, in which the circumstance arises that one of the workers responsible for processing a file no longer provides services in the municipality and it is deposited in their mailboxes of e-mail necessary information related to that specific file, it would be possible to access, with the corresponding guarantees, the e-mail messages of these workers who are linked to the aforementioned selective process, without violating the data protection regulations.

The measures that could be taken to ensure that the privacy of the affected persons is not affected, would be, for example, as contained in Recommendation 1/2013, mentioned, that the superior body of the absent worker value in the form motivated by the need for intervention and identify the specific information that needs to be accessed, that access to the email account is communicated, if possible to the employee and that it is accessed under the supervision of the superior body of the working person, among others.

### III

To the extent that the requested documentation contains personal data, the personal data protection regulations will apply to access.

Article 4.2) of the RGPD considers *“ treatment ”: cualquier operation or set of operations performed on data personal or data sets \_ personal , yes either by procedures automated or not, such as collection , registration, organization , structuring , conservation , adaptation or modification , extraction , consultation, use , communication by transmission , diffusion or any another form of enabling access , comparison or interconnection , limitation , suppression or destruction . ”*

The RGPD provides that all processing of personal data must be lawful (Article 5.1.a)) and, in this sense, establishes a system of legitimizing data processing based on the need for one of the legal bases to be met established in its article 6.1. Specifically, section c) provides that the treatment will be lawful if *“it is necessary for the fulfillment of a legal obligation applicable to the person responsible for the treatment ”*.

As can be seen from article 6.3 of the RGPD and expressly included in article 8 of Organic Law 3/2018, of December 5, on the protection of personal data and guarantee of digital rights (LOPDGDD), the processing of data it can only be considered based on this legal basis of article 6.1.c) of the RGPD when this is established by a rule with the rank of law.

For its part, article 86 of the RGPD provides that *“the data personnel of official documents in possession of some public authority or body public or a private entity to carry out a mission in interest public may be communicated by said authority , organism or entity in accordance*

*with the Law of the Union or of the States members that apply them in order to reconcile public access to official documents with the right to data protection personal under this Regulation . ”*

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

Article 18 of the LTC recognizes the right of people to *"access public information, referred to in article 2.b, in an individual capacity or in the name and representation of any legally constituted legal person"* (section 1).

Article 2.b) of the LTC defines "public information" as *"the information prepared by the Administration and that which it has in its power as a result of its activity or the exercise of its functions , including that supplied by the other obliged subjects in accordance with the provisions of this law"*.

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

The information available to the City Council linked to the personnel selection procedure that is the subject of a complaint, regardless of the form or format in which it is kept, is public information for the purposes of article 2.b) of the LTC and, therefore, it remains subject to the access regime provided for in this regulation, which establishes, as a general criterion, that the right of access to public information can only be denied or restricted for the reasons expressly established by law (article 20 and s. LTC).

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

#### IV

At the outset, it must be made clear that, in relation to access to the files of the selective processes, the criterion maintained by this Authority with respect to the persons interested in the procedure, whether with respect to files that have not been finalized at the time of present the request (in which case the administrative procedure regulations would apply with the limits of the transparency legislation) as with respect to the completed files (as would be the case at hand in which the transparency regulations are directly applied ) , is favorable to access to information in the terms set out below.

The first consideration, from the point of view of data protection, is that there would be no inconvenience in providing the person requesting access and a copy of that documentation of the personnel selection file in which they are not included personal data (Article 4.1 RGPD). This would be the case of the scales and the criteria for correcting or assessing the merits and evidence, and, for example in the case of the claim, the technical criteria for assessing the different phases of the call (those foreseen in base 5 of the selection process

of two general administration technician positions published in BOP 239 of December 14, 2018), the practical cases chosen by the court and the internship program (base 11), expressly claimed by the person requesting the access to information.

Therefore, in the case of the claim, there would be no problem in providing the claimant with the requested documentation relating to the practical cases chosen by the court that the applicants had to develop (point 1 of the document presented by the claimant) or *"the program of practices agreed by the court and communicate to the head of the service where these practices will take place"* (point 4.1 of the document presented by the claimant).

Likewise, there would also be no problem in providing him with access and a copy of that file documentation that contains exclusively his personal data, on the basis of article 15 of the RGPD, which regulates the right to 'access by the affected person to their own personal data (the documentation relating to their curriculum vitae, to the exams or tests they have taken, to the assessment carried out by the qualifying tribunal in this regard, etc. ). It would be the case, of the score awarded by each member of the court regarding the two theoretical exercises carried out by her and which she claims as part of the information referred to in point 2 of the document that specifies the claim (score awarded each member of the panel regarding the two theoretical exercises of each of the applicants).

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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 (such as the members of the qualifying Tribunal, or the human resources staff of the town hall), a priori, there would be no inconvenience in providing it to the interested person.

To the extent that the requested information is or may be in emails that may have been exchanged during the processing of the selection process by those responsible for its management and the members of the qualifying board, facilitating access to emails will entail providing personal data of senders and recipients.

It is necessary to start from the premise that the municipal corporate e-mail is the tool that the municipal administration makes available to its employees to carry out their tasks. The corporate email provides an email address for the various municipal workers. Therefore, it is to be expected that the e-mail messages that may have been sent by those responsible for processing the file contain their personal data such as name and surname, position, e-mail address and, where applicable, the phone.

At the outset, according to article 24.1 of LTC " *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 data merely identifying personal data unless, exceptionally, in the specific case the protection of personal data or other constitutionally protected rights must prevail.*"

Article 70.2 of the RLTC specifies what is meant by merely identifying personal data in the following terms:

19/2014, of December 29, personal data consisting of the name and surname, the position or position held, body and scale, the functions performed and the telephone and addresses, postal and electronic, of professional contact, referring to staff in the service of public administrations, senior positions and managerial staff in the public sector of public administrations.

*In cases where the publication or access to an administrative document requires the identification of the author, the location data, the number of the national identity document or equivalent document must be removed in particular and the handwritten signature.*

*If the signature is electronic, the electronically signed document must be published in such a way that the properties of the electronic certificate used for the signature cannot be accessed.*

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

With regard to the transcribed articles, facilitate the claimant's access to the merely identifying data of the people who, in regard to the responsibilities or functions assigned to them, have participated in the selection process that is the subject of the claim in the terms indicated, a priori would not be contrary to the right to the protection of personal data. This, unless, exceptionally, in a specific case the protection of personal data or other constitutionally protected rights must prevail.

As indicated in article 70.2 of the RLTC itself, it is not relevant in these cases to provide other identification data of employees or public officials - such as the ID number or the handwritten signature - that may appear in the documentation subject to access, given that these data, from the point of view of the principle of minimization (Article 5.1.c) RGPD), are unnecessary for the intended purpose.

Consequently, there would be no problem in facilitating access to the merely identifying data of those responsible for the processing of the file that may be contained in the e-mails, including the e-mail address.

## VI

In relation to the rest of the personal data of the participants in the personnel selection process that are not considered to be particularly protected data, a reasoned weighting must be carried out between the public interest in the disclosure of the information and the rights of the affected persons in terms of article 24.2 LTC, according to which:

*"2. If it is other information that contains personal data not included in article 23, access to the information can be given, with prior weighting of the public interest in disclosure and the rights of the affected persons. To carry out this weighting, the following circumstances must be taken into account, among others:*

- a) *The elapsed time.*
  - b) *The purpose of the access, especially if it has a historical, statistical or scientific purpose, and the guarantees offered.*
  - c) *The fact that it is data relating to minors.*
  - d) *The fact that it may affect the safety of people.*
- (...).”

The prior reasoned weighting provided for in article 24.2 of the LTC leads to the conclusion, first of all, that it is possible to facilitate access to the information that has been the subject of dissemination during the course of the selective process that may be contained in the file

In this sense, the LTC itself establishes, in its article 9.1.e), the obligation to publish (on the transparency portal or electronic headquarters) the calls for proposals and the results of the selection and staffing processes.

Article 21.2 of the RLTC specifies, in this regard, 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 the call that is the subject of the claim, base 8 provides for the publication of the . the list of applicants who have passed the selection process in order of score.

Therefore, it does not seem that facilitating access to the information that has been the subject of dissemination during the course of the selective process that may be contained in the information claimed should have particular relevance with regard to the right to the protection of personal data of the affected persons, particularly when the person requesting access, as in the cases at hand, has participated in the selection process, so it would be likely that it was already known to them.

Regarding access to information on the specific score obtained by the other participants in the selection process (document 2 presented by the claimant), for the purposes of the weighting provided for in article 24.2 LTC, it must be taken into account the reasons why the applicant is interested in knowing the information stated by the claimant are to check the legality of the procedure as a result of the fact that she has participated in the selection process and has a direct interest in verifying that the procedure has been adapted to the regulations governing it.

In the evaluation of the tests carried out and the merits accredited by the candidates, which must be done in the selection process, there is undoubtedly a margin of technical discretion that corresponds to the qualifying body. The control of this margin of discretion, to avoid arbitrariness, can only be carried out if the subject harmed by the administrative decision (the candidate not selected) has the possibility of knowing the factual elements from which the assessment made by the selection body.

Thus, in exercise of the right of defense and for the purposes of being able to verify any arbitrary actions of the qualifying body contrary to the principles of equality, merit, capacity and transparency that must govern in any procedure of this type, it would be justified that the applicant can have information on the different aspects that have been assessed in the selection process, that is knowledge and abilities (through access to the exams carried out if

applicable), merits (both academic and 'experience) and the score obtained, as well as the assessment and the score obtained in the internship period (base 11 of the call object of the claim).

As this Authority has maintained, from the point of view of the principle of data minimization (Article 5.1.c) RGPD), according to which the data subject to treatment must be adequate, relevant and necessary for the fulfillment of the purpose with access, it must be possible to access the aforementioned information relating to candidates who have obtained a better score than the applicant, but not to those who have obtained a worse score, nor to personal data unnecessary for the defense of the person concerned, such as address, telephone number, email, etc.

Having the information referring to applicants who have obtained a worse score, or who have not passed the selection process, would not be justified, given that their position with respect to the person requesting access would not prejudice their rights and interests. Therefore, it should not be made easy. It must be taken into consideration that according to the information provided by the person making the claim, she would have occupied third place and therefore, in front of her would only be the two candidates who would have passed the internship phase.

In the case of the claim is requested the score awarded by each member of the court regarding the two theoretical exercises of each of the applicants, in accordance with the criteria set out, it does not seem that there should be any inconvenience in providing the documentation that contains this information regarding the applicants who had obtained better score than the claimant (the two selected candidates), if this information is available. On the other hand, access should be denied with respect to the specific scores of the other participants with a worse score than the claimant.

The same criteria must be applied to access to the acts of the qualifying tribunal, in respect of which it may be possible to facilitate access to that information that may be contained in it referring to the candidates who had obtained a better score than the person claiming by deleting of the same information referring to the evaluations of the other candidates.

With regard to the documentation containing the evaluation and score obtained in the practice phase, which is also the subject of the claim, insofar as it is information about the finally selected candidates, there would be no problem in providing it access

Emails, in addition to the identification information of the sender and the recipient and the documentation attached to them, can incorporate in the body of the email itself, various information that contains personal data. To determine whether the body of these emails can be accessed, a weighting must also be carried out in the terms of article 24.2, which must take into account the criteria set out so far. In accordance with this, to the extent that the information they contain is linked to the claimed selection process, and as long as it does not contain personal information relating to applicants who have obtained a worse score than the person making the claim, access must be granted.

## **conclusion**

The data protection regulations do not prevent the claimant from accessing the claimed information that does not contain personal data, such as that relating to the practical cases that the applicants had to develop or the internship program that the selected candidates had to carry out. Nor would it prevent access to the score that each member of the tribunal awarded to the two exercises carried out by the person claiming or to the scores of the two exercises carried out by the rest of the candidates who had obtained a score higher than that of the person claiming, nor likewise, to the score of the candidates in the practice phase.

With regard to the acts of the qualifying court, the person making the claim must be able to access their content as long as they do not contain scores or information about the candidates who obtained a score lower than the person making the claim.

He must also be able to access the purely identifying data such as the name and surname and the position of the people who have intervened in the processing of the file, including their email address.

Barcelona 2, December 2022

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